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Changing Paradigms in the Law of Homicide

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The law of homicide is undergoing a little noticed but fundamental shift in how it classifies intentional homicides. Under the traditional approach, just a few aggravating and mitigating circumstances decide whether a killing is classified as first or second-degree murder or voluntary manslaughter. This approach has begun to give way to a new approach, which derives from the Model Penal Code's death penalty provisions. The expanding use and larger significance of this new approach outside of the death penalty has been largely overlooked.

This article examines the new approach as a general framework for grading intentional homicides. It argues that the traditional criteria for drawing lines between offenses frequently produce results that offend the purposes of criminal punishment and basic moral sensibilities. The new grading paradigm promises to do much better by changing and expanding the circumstances relevant to the grade of the offense and by permitting the weighing of aggravating against mitigating circumstances where both exist. The article argues that even the new approach must be modified to treat the killer's violation of family obligations as an aggravating circumstance in many situations. Otherwise, the law leaves itself vulnerable to a well-founded charge that it does not treat domestic violence with the seriousness it deserves.

To illustrate its points, the article presents the text of a draft statute based upon the new approach, applies that statute to selected cases, and defends it against pertinent objections.

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INTRODUCTION

Over the last quarter century the law of homicide has come to incorporate two competing paradigms. Intentional homicides¹ are typically classified into the offenses of first-degree or capital murder, second-degree murder, and voluntary manslaughter.² These offenses seek to classify intentional homicides according to their relative seriousness,³ and the choice among them can affect the length of imprisonment by decades,⁴ as well as determine the defendant's eligibility for the death penalty.⁵ The law is now in the midst of a little noticed paradigm shift in how the lines among these various offenses are drawn.

¹ Under generally applicable principles, a homicide is "intentional" if the defendant either had the victim's death as his motive or was practically certain that his actions would result in the victim's death. See MODEL PENAL CODE § 2.02 cmt. 2, at 233-234 (1980); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.2(a) (2d ed. 1986) [hereinafter LAFAVE & SCOTT]; Lloyd L. Weinreb, *Homicide: Legal Aspects*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 858, 859-61 (Sanford H. Kadish ed., 1983) [hereinafter ENCYCLOPEDIA].

This article does not address which circumstances do and ought to operate as complete defenses to homicide liability, such as self-defense. It also does not address the classification of unintentional homicides.

² See JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 347-48 (4th ed. 2000); LAFAVE & SCOTT, *supra* note 1, § 7.7, at 642.

³ MODEL PENAL CODE § 210.1 cmt. 2, at 6 (1980); Frank Brenner, *The Impulsive Murder and the Degree Device*, 22 FORDHAM L. REV. 274, 275-76 (1953); Herbert Wechsler & Jerome Michael, *A Rationale for the Law of Homicide: I*, 37 COLUM. L. REV. 701, 701-03 (1937).

⁴ See, e.g., CAL. PENAL CODE §§ 189, 190, 192, 193 (West 1999) (punishment for first-degree murder is death, life without parole, or twenty-five years; twenty years to life for second-degree murder; and three, six, or eleven years for voluntary manslaughter); 18 PA. CONS. STAT. ANN. §§ 1102, 2502, 2503 (West 1998 & Supp. 2000) (punishment for first-degree murder is death or life imprisonment; life imprisonment for second-degree murder; and not more than ten years for voluntary manslaughter); KAN. STAT. ANN. §§ 21-3401, 21-3402(a), 21-3403, 21-4635, 21-4704, 21-4706 (1995 & Supp. 1999) (penalty for premeditated murder is death, mandatory forty years imprisonment without deductions for good time, or life imprisonment; life imprisonment for second-degree intentional murder; and between four and seventeen years for voluntary manslaughter, depending on defendant's criminal history). Under the federal sentencing guidelines, first-degree murder carries a presumptive sentence of life imprisonment; second-degree murder carries a sentencing range as low as thirteen to sixteen years, depending on the perpetrator's criminal history score; and voluntary manslaughter as low as five to six years, depending on the criminal history score. U.S. SENTENCING GUIDELINES MANUAL §§ 2A1.1, 2A1.2, 2A1.3, 5A (1987).

⁵ See, e.g., CAL. PENAL CODE § 190 (West 1999); MD. CODE ANN. art. 27, § 407 (1996); 18 PA. CONS. STAT. ANN. § 1102 (West 1998 & Supp. 2000); VA. CODE ANN. § 18.2-32(1)-(9) (Michie Supp. 2000); KAN. STAT. ANN. § 21-3439 (1995).

The traditional paradigm, which traces its roots to the seventeenth and eighteenth centuries,⁶ makes the grade of the offense dependent upon just a few aggravating and mitigating circumstances. Most jurisdictions put an intentional killing into the most serious category of first-degree murder if it was accompanied by one of two aggravating circumstances: premeditation or contemporaneous commission of a dangerous felony.⁷ An intentional killing is assigned to the least serious offense category of voluntary manslaughter if the killer was in the throes of an extreme mental or emotional state, understandably created.⁸ Second-degree murder is the default category that encompasses killings not accompanied by one of these few aggravating or mitigating circumstances.

Over the last few decades, a new and fundamentally different grading paradigm has emerged. This paradigm, which derives from the Model Penal Code's death penalty provisions,⁹ takes into account a much wider array of aggravating and mitigating circumstances. Rather than focusing only on premeditation, contemporaneous commission of a felony, and an overwrought emotional or mental state, it considers numerous other aggravating and mitigating circumstances such as whether the killer manifested extreme cruelty or the victim consented to the killing. It also allows aggravating and mitigating circumstances to be weighed against each other in cases where both exist. All death penalty states and the federal government now make some use of this new grading paradigm.¹⁰

Although the new paradigm has had an increasing influence, its use so far has been largely restricted to the implementation of the death penalty.¹¹ No jurisdiction has completely abandoned the traditional paradigm, which a majority of jurisdictions continue to use in distinguishing degrees of murder and which virtually all jurisdictions use in drawing the line between murder and manslaughter.¹²

⁶ The doctrine that heat-of-passion, excusably provoked, reduces an intentional killing from murder to manslaughter "began to assume a recognisable form and function" in seventeenth-century England. A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE. L.J. 292 (1976). The criminal statutes of the newly independent American states incorporated the common law distinction between murder and manslaughter. In 1794, the Pennsylvania Assembly enacted a statute that divided murder into degrees based on whether the killing was premeditated or not and whether the killer was contemporaneously committing a felony. See *infra* notes 17–19 and accompanying text.

⁷ See *infra* Part I.A.

⁸ See *infra* Part I.B. Some jurisdictions also reduce murder to manslaughter in cases of "imperfect" self-defense. See *infra* note 55 and accompanying text.

⁹ MODEL PENAL CODE § 210.6 (1980).

¹⁰ See *infra* notes 42–47 and accompanying text.

¹¹ For an explanation of how the relationship between the traditional and new paradigms stands under existing law, see *infra* Part I.

¹² See *infra* Part I.

Scholarly attention to the new paradigm likewise has focused almost exclusively on its current role in regulating the death penalty.¹³ This narrow focus is understandable.¹⁴ But it is unfortunate because the new paradigm is not merely a way of implementing the death penalty. With or without a death penalty, it furnishes a coherent alternative model for the classification of homicides generally. In the hue and cry over the death penalty, this larger significance of the new paradigm has not yet been widely recognized, much less evaluated.

This article's central thesis is that, with some significant modification of its content, the new paradigm provides a sensible general framework for grading intentional homicides. The paradigm shift now underway accordingly should be pursued to completion. On any measure, the traditional paradigm produces glaring

¹³ The bulk of the literature is highly critical of existing death penalty law in both its constitutional and statutory aspects. *See, e.g.*, Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283 (1997); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995); Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375 (1994); Franklin E. Zimring & Gordon Hawkins, *A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide*, 46 MD. L. REV. 115 (1986). The Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), marks the beginning of significant constitutional regulation of the death penalty. According to the *Furman* Court, the Eighth Amendment prohibits states from vesting sentencing juries with unfettered discretion to decide which murderers or first-degree murderers deserve death. *See infra* notes 26–28 and accompanying text. Critics of the Court's complex post-*Furman* death penalty jurisprudence generally argue that it does not adequately narrow the class of murderers who are eligible for the death penalty and still leaves the jury with enormous and largely unguided discretion to impose death. *But see* David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545 (1997) (arguing that the Supreme Court's jurisprudence and post-*Furman* statutes have been moderately successful in decreasing the overinclusivity of the death penalty).

For an exception to the literature's concentration on the death penalty, see SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* (1998). Focusing exclusively on a retributivist view of punishment, Professor Pillsbury argues that bad motive is the *sine qua non* of the most serious homicides. In his view, the new paradigm marks an improvement over traditional law because many of the additional aggravating factors on which the new paradigm relies involve "an especially bad motive." *Id.* at 110. Nonetheless, his prescription for change differs fundamentally both from the new paradigm and this article's proposals. Unlike Professor Pillsbury's proposal, the new paradigm and this article would, first, recognize aggravating circumstances that are not directly related to the killer's motive but that nonetheless strengthen the retributivist and utilitarian justifications for punishment; second, permit aggravating and mitigating circumstances to be weighed against each other; third, generally treat the existence of a family relationship as an aggravating circumstance; and, finally, extend the aggravating-mitigating circumstances model to the law of manslaughter.

¹⁴ The new paradigm did originate as a means of implementing the death penalty. *See supra* note 9 and accompanying text.

inaccuracies in classifying intentional homicides according to their relative seriousness. In defining the most serious category of intentional homicides, it overlooks aggravating circumstances whose importance surpasses that of premeditation as well as the mitigating significance premeditation itself sometimes possesses. A physician who thoughtfully considers and accedes to a dying patient's request for a lethal injection is guilty of first-degree murder while a father who brutally kills his child in a rage over bed-wetting is guilty of a lesser offense. The new paradigm, which some jurisdictions already have begun to use to distinguish degrees of murder,¹⁵ helps avoid these problems by changing and expanding the aggravating factors relevant to the identification of the most serious intentional homicides.

No jurisdiction uses this more expansive approach in identifying the least serious offense category, voluntary manslaughter. Existing law instead takes an unduly constricted view of the mitigating circumstances sufficient to reduce an intentional killing from murder to manslaughter and also ignores the presence of aggravating circumstances. The law's failure to consider the joint import of both aggravating and mitigating circumstances has produced troubling results. In many of the cases now classifiable as voluntary manslaughter, the defendant has killed a spouse, thereby depriving his or her children of a parent and/or failing to respect the victim's legal right to divorce. In allowing murder to be reduced to manslaughter despite the breach of such family obligations, existing law leaves itself open to a well-founded criticism that it does not treat domestic violence with the seriousness it deserves.¹⁶ In appropriate circumstances, a breach of family obligations should be treated as an aggravating factor relevant to the grade of the offense. The new paradigm, which weighs both aggravating and mitigating circumstances, furnishes a better framework for accomplishing this badly needed reform.

This article begins in Part I by chronicling the origins of the traditional paradigm and the surprisingly swift rise of the new paradigm. Part II moves from description to evaluation and critiques the traditional bases for dividing murder into degrees. It argues that, first, premeditation and commission of a felony are not the only aggravating factors that warrant placing an intentional killing in the most serious offense category; second, premeditation sometimes has mitigating significance; and, third, other powerful mitigating factors can and sometimes do coexist alongside premeditation. In Part III, this article presses parallel criticisms of the traditional line between murder and manslaughter. In both its common law and Model Penal Code incarnations, the law's current definition of the least serious category of intentional homicides is both underinclusive because it considers too few mitigating circumstances and overinclusive because it relies on circumstances lacking genuine mitigating significance and because it ignores aggravating factors such as the killer's breach of family obligations. Responding to these criticisms, Part IV outlines a

¹⁵ See *infra* notes 43–44.

¹⁶ See generally *infra* Part III.

reconstruction of homicide law that follows the general structure of the new paradigm, albeit with significantly modified content. It sets forth a draft statute embodying a proposed list of aggravating and mitigating circumstances, illustrates the proposed approach by applying it to selected cases, and responds to the most prominent potential objections.

I. THE RISE OF THE NEW PARADIGM

The story of the new paradigm begins with the traditional approach it has already begun to eclipse. The traditional approach has two separate components, one concerned with dividing murder into degrees and the other with distinguishing between murder and manslaughter.

A. *Dividing Murder into Degrees*

Under common law principles borrowed by the newly independent United States, the death penalty was a mandatory punishment for all cases of murder.¹⁷ In an effort to limit the scope of the death penalty, the legislature of the State of Pennsylvania in 1794 enacted a statute dividing murder into first and second-degrees, with the death penalty reserved for first-degree murder.¹⁸ Under the Pennsylvania statute, intentional killings that are either premeditated or committed in furtherance of a felony are treated as first-degree murder, while other intentional killings are second-degree murder.¹⁹

The Pennsylvania statute proved popular. Throughout the nineteenth century more and more American states followed its lead, dividing murder into degrees based upon the presence or absence of premeditation or concurrent commission of a felony. A majority of American jurisdictions still use the traditional Pennsylvania model as a basis for distinguishing between degrees of murder.²⁰

¹⁷ See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976).

¹⁸ See MODEL PENAL CODE § 210.2 cmt. 2, at 16 (1980). See generally Wechsler & Michael, *supra* note 3, at 701–703; Brenner, *supra* note 3, at 275–76. For a discussion of the English law antecedents of premeditation, see PILLSBURY, *supra* note 13, at 100–01.

¹⁹ MODEL PENAL CODE § 210.2 cmt. 2, at 16 (1980).

²⁰ Twenty-eight states, the District of Columbia, and the federal government now make premeditated killing first-degree murder. 18 U.S.C. § 1111 (1994); ARIZ. REV. STAT. § 13-1105 A.1. (2000); ARK. CODE ANN. § 5-10-101(a)(4) (Michie 1997); CAL. PENAL CODE § 189 (West 1999); COLO. REV. STAT. ANN. § 18-3-102(1)(a) (West 2000); D.C. CODE ANN. § 22-2401 (Supp. 2000); FLA. STAT. ANN. § 782.04(1)(a) (West Supp. 2000); IDAHO CODE § 18-4003(a) (Michie 1997); IOWA CODE ANN. § 707.2(1) (West Supp. 1999); KAN. STAT. ANN. § 21-3401(a) (1995); MD. ANN. CODE art. 27, § 407 (1996); MASS. GEN. LAWS ch. 265, § 1 (1998); MICH. COMP. LAWS ANN. § 750.316 (West Supp. 1999); MINN. STAT. § 609.185 (1996); MO. REV. STAT. § 565.020 (1994); NEB. REV. STAT. § 28-303 (1995); NEV. REV. STAT. § 200.030 (1995); N.H. REV. STAT.

In addition to giving rise to the Pennsylvania premeditation model in the late eighteenth century, the death penalty's perceived problems also created the impetus for the new paradigm in the mid-twentieth century. In limiting the mandatory death penalty to cases of first-degree murder, the 1794 Pennsylvania statute began a long trend of limiting the cases in which death was imposed. Throughout the nineteenth and twentieth centuries more and more legislatures eliminated mandatory death penalties and gave juries discretion whether to impose death for first-degree murder.²¹

ANN. § 630:1-a (1996); N.M. STAT. ANN. § 30-2-1 (Michie 1994); N.C. GEN. STAT. § 14-17 (1999); OHIO REV. CODE ANN. § 2903.01 (Anderson 1998) (purposeful killings with prior calculations and design constitute aggravated murder); 18 PA. CONS. STAT. ANN. § 2502 (West 1998 & Supp. 2000); R.I. GEN. LAWS § 11-23-1 (Supp. 1999); S.D. CODIFIED LAWS § 22-16-4 (Michie 1998); TENN. CODE ANN. § 39-13-202 (Supp. 2000); VT. STAT. ANN. tit. 13 § 2301 (1998); VA. CODE ANN. § 18.2-32 (Michie Supp. 2000); WASH. REV. CODE ANN. § 9A.32.030 (West 2000); W. VA. CODE ANN. § 61-2-1 (Michie 2000); WYO. STAT. ANN. § 6-2-101(a) (Michie 1999).

The number of states that use premeditation as a basis for distinguishing between first and second-degree murder has decreased slightly over the last forty years. In 1959, thirty-four states treated premeditated killings as first-degree murder. MODEL PENAL CODE § 201.6 cmt. 2, at 66 (Tentative Draft No. 9, 1959).

Thirty-three states and the District of Columbia treat an intentional killing in the course of committing a felony as first-degree murder or its equivalent. ARIZ. REV. STAT. § 13-1105 A.2. (2000); ARK. CODE ANN. § 5-10-101 (Michie 1997) (capital murder); CAL. PENAL CODE § 189 (West 1999); COLO. REV. STAT. ANN. § 18-3-102(b) (West 2000); DEL. CODE ANN. tit. 11 § 636(a) (1995); D.C. CODE ANN. § 22-2401 (Supp. 2000); FLA. STAT. ANN. § 782.04 (West Supp. 2000); IDAHO CODE § 18-4003(d) (Michie 1997); 720 ILL. COMP. STAT. ANN. § 5/9-1 (West Supp. 1999); IOWA CODE ANN. § 707.2(2) (West Supp. 1999); KAN. STAT. ANN. § 21-3401 (1995); LA. REV. STAT. ANN. §§ 14:30, 14:30.1 (West Supp. 2000); MD. ANN. CODE art. 27, § 410 (Supp. 2000); MICH. COMP. LAWS ANN. § 750.316 (West Supp. 1999); MINN. STAT. § 609.185 (1996); MISS. CODE ANN. § 97-3-19(e)-(f) (1999) (capital murder); NEB. REV. STAT. § 28-303 (1995); NEV. REV. STAT. § 200.030 (1995); N.H. REV. STAT. ANN. § 630:1-a (1996); N.M. STAT. ANN. § 30-2-1(2) (Michie 1994); N.Y. PENAL LAW § 125.27 (McKinney 1998) (felony murder is first-degree murder when killing is intentional and most directly resulted from acts of defendant rather than someone else); N.C. GEN. STAT. § 14-17 (1999) (felony murder is first-degree murder when committed with a deadly weapon); OHIO REV. CODE ANN. § 2903.01 (Anderson 1998) (purposeful killings in commission of a felony are aggravated murder); R.I. GEN. LAWS § 11-23-1 (Supp. 1999); S.D. CODIFIED LAWS § 22-16-4 (Michie 1998); TENN. CODE ANN. § 39-13-202(2) (Supp. 2000); TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1994); UTAH CODE ANN. § 76-5-202(1)(d) (1999); VT. STAT. ANN. tit. 13, § 2301 (1998); VA. CODE ANN. § 18.2-32 (Michie Supp. 2000); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (2000); W. VA. CODE ANN. § 61-2-1 (Michie 2000); WYO. STAT. ANN. § 6-2-101(a) (Michie 1999).

²¹ *Woodson*, 428 U.S. at 291-92 (1976) (footnotes omitted):

[B]y the end of World War I, all but eight States, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether. By 1963, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing.

"By the mid-twentieth century, mandatory death penalties were rare and typically confined to crimes hardly ever committed, for example, treason."²²

Given that the death penalty was no longer mandatory for first-degree murder, the question became how to decide who among the class of first-degree murderers deserved to die. The law supplied standards governing eligibility for the death penalty: the jurors had to find that the accused had committed a capital crime such as first-degree murder.²³ But beyond the threshold question of eligibility, the law essentially left jurors on their own without any guiding legal standards.²⁴ By the 1960s and early 1970s, a decision in favor of death had become a rare event as prosecutors sought and juries exercised discretion to impose that penalty in just a small fraction of cases involving commission of a capital offense.²⁵

In 1972, the United States Supreme Court stepped in and forced states to change their death penalty regimes. In *Furman v. Georgia*,²⁶ the Court held that the

²² 1 ENCYCLOPEDIA, *supra* note 1, at 134; *See also* McGautha v. California, 402 U.S. 183, 198–99 (1971); MODEL PENAL CODE § 201.6 cmt. 2, at 66 (Tentative Draft No. 9, 1959).

²³ In addition to murder, many state statutes authorized the death penalty for rape and kidnapping. A few even made robbery and/or burglary capital offenses. THORSTEN SELLIN, THE AMERICAN LAW INSTITUTE, THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE, at 3–4 (1959), *reprinted in* MODEL PENAL CODE (Tentative Draft No. 9, 1959).

²⁴ KAPLAN ET AL., *supra* note 2, at 510.

²⁵ MODEL PENAL CODE § 210.6 cmt. 1, at 114–15 (1980); *Gregg v. Georgia*, 428 U.S. 153, 182 n.26 (1976) (noting estimate that "before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment"). "The annual average [number of executions across the entire United States] during the 1930s was 167; during the 1940s, 128; in the 1950s, 72; and 19 in the 1960s." 1 ENCYCLOPEDIA, *supra* note 1, at 134.

²⁶ 408 U.S. 238 (1972). The Court rendered a brief per curiam opinion, which merely declared the death sentences in the three cases before the Court in violation of the Eighth Amendment. In the accompanying concurring opinions, Justices Brennan and Marshall made clear their view that the death penalty is per se unconstitutional in all circumstances. 408 U.S. at 305–06 (Brennan, J., concurring); *id.* at 359, 369, 370 (Marshall, J., concurring). The three other Justices in the 5–4 majority took the more moderate position that the death penalty statutes in the cases before the Court were unconstitutional as applied because they allowed the jury to impose death for murder or rape without giving the jury any standards to guide its decision. *Id.* at 256–57 (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 312–13 (White, J., concurring).

With the exception of the few little-used statutes making the death penalty mandatory, *Furman* implied the unconstitutionality of all death penalty statutes then in force. Like the Georgia and Texas statutes involved in *Furman* itself, those statutes gave the jury unfettered discretion whether to impose death. "[O]n the same day *Furman* was decided the Court vacated death sentences imposed in twenty-six states." Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974).

infrequent imposition of the death penalty and the standardless discretion of juries to impose it amounted to "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."²⁷ Crucial to the Court's holding was the conclusion on the part of the swing Justices that, as a result of the purely discretionary nature of the decision, "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."²⁸

In *Furman*'s immediate aftermath, thirty-five states enacted death penalty legislation aimed at allaying the Justices' concern for standardless death sentencing discretion.²⁹ The new statutes fell into two basic categories. A number of states sought to eliminate sentencing discretion altogether by making the death penalty mandatory for certain offenses.³⁰ Many other states adopted an alternative approach patterned in varying degrees on the death penalty provisions of the Model Penal Code.³¹

In a series of 1976 decisions, the Supreme Court struck down mandatory death penalty provisions³² but upheld the statutes based upon the Model Penal Code.³³ As

Discussions of *Furman* and its "somewhat elusive demands" are legion. KAPLAN ET AL., *supra* note 2, at 512–13; *see, e.g.*, sources cited *infra* note 33. For a particularly illuminating recent account, *see* Steiker & Steiker, *supra* note 13, at 361–71.

²⁷ 408 U.S. at 240.

²⁸ 408 U.S. at 313 (White, J., concurring). As Justice Stewart put the same point, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 309 (Stewart, J., concurring); *see also* 408 U.S. at 253 (Douglas, J., concurring) (statutes gave "uncontrolled discretion" to sentencers and provided "no standards [to] govern selection of the penalty").

²⁹ *Gregg v. Georgia*, 428 U.S. 153, 179–80 n.23 (1976); MODEL PENAL CODE § 210.6 cmt. 12, at 156 n.144 (1980) (listing seventeen states as having adopted death penalty statutes providing for consideration of aggravating and mitigating circumstances).

³⁰ *Woodson v. North Carolina*, 428 U.S. 280, 308, 313 (1976) (Rehnquist, J., dissenting) ("following *Furman* 10 states enacted laws providing for mandatory capital punishment"); MODEL PENAL CODE § 210.6 cmt. 12, at 156 n.145 (1980) (listing eighteen states as having "adopted mandatory death penalty statutes after *Furman*").

³¹ The state statutes were patterned after section 201.6 of Tentative Draft No. 9 of the Model Penal Code, promulgated in 1959. That section was then incorporated as section 210.6 of the Proposed Official Draft of the Model Penal Code published in 1962 and approved by the Council of the American Law Institute in that same year. The Advisory Committee that drafted the model death penalty provisions had voted 18–2 in favor of abolishing the death penalty but the Council of the American Law Institute was "substantially united in the view that the Institute [could not] be influential on [whether states chose to retain or abolish the death penalty] and should not, therefore, take a position either way." MODEL PENAL CODE § 201.6 cmt. 1, at 65 (Tentative Draft No. 9, 1959).

³² *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

a result of these decisions, all death penalty regimes now effectively follow the basic structure of the Model Penal Code.³⁴

The Model Penal Code death penalty provisions have three basic features. First, the Code bifurcates a capital trial into two separate phases, the guilt-innocence phase and a subsequent sentencing phase.³⁵ Second, in an effort to guide the sentencer's³⁶ deliberations, the Model Penal Code specifies eight aggravating factors and permits death to be imposed only if the sentencer finds the presence of at least one such factor.³⁷ Third, it enumerates eight mitigating factors and permits a decision in favor of the death penalty only upon consideration of the joint import of aggravating and mitigating factors.³⁸

³³ See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). For useful discussions of *Furman* and the 1976 decisions, see FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 50-73 (1986); MODEL PENAL CODE § 210.6 cmt. 12, at 153-61; Steiker & Steiker, *supra* note 13.

³⁴ See MODEL PENAL CODE § 210.6 cmt. 12, at 171 (1980) (the actions of the Court have "left Model Penal Code provision [§ 210.6] as the constitutional model for capital sentencing statutes"); Zimring & Hawkins, *supra* note 13, at 123 (after *Furman* the "Code provisions became the model for capital punishment legislation"); *infra* notes 39-41 and accompanying text.

³⁵ MODEL PENAL CODE § 210.6(2) cmt. 8, at 144-49. The rationale for bifurcation is that the alternative of deciding guilt-innocence and the appropriate punishment at the same time creates an undue tension between the rationality of the two determinations. One large problem is that evidence relevant to the appropriate punishment such as the accused's prior convictions may be inadmissible on the issue of guilt or innocence due to its prejudicial impact. If such evidence is admitted at a trial designed to decide both guilt-innocence and the appropriate punishment, the rationality of sentencing decision is enhanced at the expense of detracting from the fairness of the guilt-innocence determination. If such evidence is excluded, the fairness of the guilt-innocence determination is enhanced at the expense of detracting from the rationality of the sentencing decision. All death penalty schemes provide for a bifurcated decision making process. Steven Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 3 n.4, app. at 1 (1980).

³⁶ The Model Penal Code sets forth alternative provisions, one set vesting the sentencing decision with the same jury that determined the defendant's guilt and the other set with the presiding judge. MODEL PENAL CODE § 210.6(2)-(3) (1980). "In a majority of death penalty states, the same right to a jury the defendant enjoys at the guilt phase applies at the penalty phase." KAPLAN ET AL., *supra* note 2, at 527.

³⁷ MODEL PENAL CODE § 210.6(3) (1980). The aggravating circumstances are: (a) the killer was a convict in prison at the time of the killing; (b) the killer had a previous conviction for murder or a violent felony; (c) there were multiple victims; (d) the killer knowingly created a great risk of death to many persons; (e) the killing was committed in the course of a felony; (f) the killing was committed to avoid arrest or to escape; (g) pecuniary gain was the motive; and (h) the killing involved great cruelty. *Id.*

³⁸ The sentencer may choose the death penalty only if "there are no mitigating circumstances sufficiently substantial to call for leniency." MODEL PENAL CODE § 210.6(2) (1980). The eight enumerated mitigating circumstances are: (a) the accused had no significant criminal record; (b) the victim participated in the accused's conduct or consented to the killing; (c) the accused believed

Although the post-*Furman* death penalty statutes now on the books depart from the Model Penal Code provisions in some significant respects,³⁹ they share with the Model Penal Code two basic features that, taken together, constitute a new paradigm for grading homicides. First, they expand the aggravating circumstances that may justify putting an intentional killing into the most serious offense category. In contrast, the traditional paradigm relies upon only two aggravating circumstances—premeditation and killing in furtherance of a dangerous felony. Second, the death penalty statutes require consideration of mitigating circumstances as well as aggravating circumstances.⁴⁰ Indeed, for purposes of the death penalty, the Supreme Court has held that the Constitution requires that the sentencer be free to consider any and all relevant mitigating circumstances.⁴¹ The traditional grading paradigm, in

there was moral justification for the killing; (d) the accused was an accomplice and his role in the killing was relatively minor; (e) the accused acted under duress or was dominated by another; (f) the accused's capacity to understand the wrongfulness of his action or control himself was impaired by mental illness or by intoxication; and (h) the accused was youthful. *Id.* at § 210.6(4). The sentencer may consider aggravating or mitigating factors beyond those that are enumerated, but may impose death only if it finds the presence of at least one enumerated aggravating factor. *Id.* at § 210.6(2) (The sentencer "shall take into account the aggravating and mitigating circumstances enumerated in sections (3) and (4) and any other facts that it deems relevant").

³⁹ See KAPLAN ET AL., *supra* note 2, at 518–46; Zimring & Hawkins, *supra* note 13, at 124–25. The statutes typically make some changes to the list of aggravating and mitigating factors. For instance, many states add the victim's status as a law enforcement officer or as a child or vulnerable person as an aggravating factor. See ARIZ. REV. STAT. § 13-703 F.9. to 10. (Supp. 1999); ARK. CODE ANN. § 5-4-604, 5-4-605 (Michie 1997); CAL. PENAL CODE § 190.2(a)(7)–(8) (West 1999). A few add premeditation to the list of aggravating factors. See COLO. REV. STAT. 16-11-103(1)(a) (2000) (appropriateness of sentence to be determined by three-judge panel rather than jurors); MONT. CODE ANN. 46-18-301 (1999) (same).

In addition, a number of statutes differ from the Model Penal Code on the standard governing the consideration of aggravating and mitigating circumstances. See *infra* note 40.

Death penalty statutes also differ from one another on the roles of judge and jury, see *supra* note 36, as well as the applicability of reasonable doubt and unanimity requirements. See McCord, *supra* note 13, at 561–65.

⁴⁰ Some states follow the Model Penal Code in directing the sentencer to weigh aggravating and mitigating circumstances. However, others are largely silent beyond the standard requirement that the sentencer find the existence of at least one aggravating circumstance. See KAPLAN ET AL., *supra* note 2, at 544–46; Steiker & Steiker, *supra* note 13, at 386–87; Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 25 n.10 (1997). See generally Srikanth Srinivasan, Note, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347 (1995). Still, especially in light of the constitutional requirement that the sentencer be free to consider all relevant mitigating circumstances, see *infra* note 41 and accompanying text, it is not clear "how decisionmaking could proceed in non-weighing states apart from some sort of makeshift balancing or weighing." Steicker & Steicker, *supra* note 13, at 387 n.153.

⁴¹ Skipper v. South Carolina, 476 U.S. 1, 9 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (plurality opinion).

contrast, takes no account of mitigating circumstances that also might be present alongside the two aggravating circumstances it deems relevant. In making numerous aggravating and mitigating factors relevant and in requiring consideration of their joint import where they coexist, the post-*Furman* death penalty statutes constitute a fundamentally new approach for grading homicides.

Over two-thirds of the states now make some use of this new paradigm in grading intentional murders. All death penalty jurisdictions, which include thirty-eight states and the federal government,⁴² utilize the new paradigm in some fashion. Several states' grading regimes explicitly incorporate it by defining the most serious grade of murder in terms of numerous aggravating circumstances that make an intentional killing death-penalty eligible.⁴³ A few non-death penalty states also define the most serious grade of homicide in terms of an expanded list of aggravating circumstances characteristic of the new paradigm.⁴⁴ Other states incorporate the new paradigm into their grading schemes implicitly. A number of states do not formally divide murder into degrees but, following the basic structure of the new paradigm,

⁴² 18 U.S.C. §§ 3591-3593 (1994); 10 U.S.C. § 852 (1994); ALA. CODE §§ 13A-5-45 to -53 (1994); ARIZ. REV. STAT. § 13-703 (Supp. 1999); ARK. CODE ANN. § 5-4-602 (Michie 1997); CAL. PENAL CODE § 190.2 (West 1999); COLO. REV. STAT. § 16-11-103 (2000); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1999); DEL. CODE ANN. tit. 11, § 4209 (1995); FLA. STAT. ANN. § 921.141 (West Supp. 2000); GA. CODE ANN. §§ 17-10-30 to 17-10-32 (1999); IDAHO CODE § 19-2515 (Michie Supp. 1999); 720 ILL. COMP. STAT. § 5/9-1 (Supp. 2000); IND. CODE ANN. § 35-50-2-9 (West 1998); KAN. STAT. ANN. § 21-4624 (1995); KY. REV. STAT. ANN. § 532.025(1)(b) (Michie 1999); LA. CODE CRIM. PROC. ANN. art. 905 to 905.9 (West 1997 & Supp. 2000); MD. ANN. CODE art. 27, § 413 (Supp. 1998); MASS. GEN. LAWS ANN. ch 279, §§ 68-70 (West 1992); MISS. CODE ANN. § 99-19-101 (1999); MO. REV. STAT. § 565.001 (1999); MONT. CODE ANN. §§ 46-18-301 to -310 (1999); NEB. REV. STAT. §§ 29-2520 to -2523 (1995); NEV. REV. STAT. §§ 200.030, 200.033 (1999); N.H. REV. STAT. ANN. § 630.5 (1996); N.J. STAT. ANN. 2C:11-3 (West Supp. 1999); N.M. STAT. ANN. § 31-20A-3 (Michie 1994); N.Y. CRIM. PROC. LAW § 400.27 (Supp. 2000); N.C. GEN. STAT. § 15A-2000 (1999); OHIO REV. CODE ANN. §§ 2929.03-06 (Anderson 1999); OKLA. STAT. ANN. tit. 21, § 701.11 (Supp. 1999); OR. REV. STAT. §§ 163.095, 163.150 (Supp. 1990 & 1998); 42 PA. CONS. STAT. ANN. § 9711 (West 1998 & Supp. 2000); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1976 & Supp. 2000); S.D. CODIFIED LAWS §§ 23A-27A-1 to -41 (Michie 1998); TENN. CODE ANN. § 39-13-204 (Supp. 1999); TEX. CRIM. P. CODE ANN. § 37.071 (Vernon Supp. 1999); UTAH CODE ANN. § 76-3-207 (1999); VA. CODE ANN. § 19.2-264.2 (Michie Supp. 2000); WASH. REV. CODE ANN. §§ 10.95.020-.900 (West 1994 & Supp. 2001); WYO. STAT. ANN. § 6-2-102 (1999).

⁴³ CONN. GEN. STAT. ANN. § 53a-54b (West Supp. 1999); 720 ILL. COMP. STAT. ANN. § 5/9-1 (West Supp. 2000); 8A LA. REV. STAT. ANN. § 14:30 (West Supp. 2000); MISS. CODE ANN. § 97-3-19 (1999); N.H. REV. STAT. ANN. §§ 630:1, 630:5 (1996); N.Y. PENAL LAW § 125:27 (McKinney 1998); N.Y. CRIM. PROC. LAW § 400.27.3 (McKinney Supp. 2000); OR. REV. STAT. §§ 163.095, 163.150 (1990 & Supp. 1998); TEX. PENAL CODE ANN. § 19.03 (Vernon 1994); UTAH CODE ANN. § 76-5-202 (1999).

⁴⁴ See HAW. REV. STAT. § 707-701 (Supp. 1992); IDAHO CODE § 18-4003 (Michie 1997); R.I. GEN LAWS § 11-23-1 (Supp. 1999); VT. STAT. ANN. tit. 13, § 2303 (1998).

make a murderer eligible for the death penalty based upon the presence of one of a number of enumerated aggravating circumstances.⁴⁵ This approach implicitly divides murder into two degrees, namely murders that are and are not subject to the death penalty, and does so based upon the new paradigm. Many other states superimpose the new over the traditional paradigm. They use the traditional approach's two aggravating factors—premeditation and a killing in furtherance of a felony—to define the category of first-degree murder and then list additional aggravating circumstances to decide which first-degree murders are eligible for the death penalty.⁴⁶ This has the implicit effect of dividing murder into three degrees.⁴⁷ The division between first and

⁴⁵ ALA. CODE §§ 13A-6-2, 13A-5-49 (1994 & Supp. 1999); DEL. CODE ANN. tit. 11, § 4209 (1995); GA. CODE ANN. § 16-5-1, 17-10-30 (1999); 720 ILL. COMP. STAT. ANN. § 5/9-1 (West Supp. 2000); IND. CODE ANN. §§ 35-42-1-1, 35-50-2-9 (West 1998); KY. REV. STAT. ANN. §§ 507.020, 532.025 (Michie 1999); MISS. CODE ANN. §§ 97-3-19, 99-19-101 (1999); MONT. CODE ANN. §§ 45-5-102, 46-18-303, 46-18-305 (1999); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1999); OKLA. STAT. ANN. tit. 21, §§ 702.7, 701.11, 701.12 (Supp. 1999); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1976 & Supp. 2000).

⁴⁶ See, e.g., ARIZ. REV. STAT. §§ 13-703, 13-1105 (Supp. 1999); CAL. PENAL CODE §§ 189 & 190.2 (West 1999); FLA. STAT. ANN. §§ 782.04, 921.141 (West 2000 & Supp. 2001); KAN. STAT. ANN. §§ 21-3401(a), 21-3439 & 21-4625 (1995); MD. ANN. CODE art. 27, §§ 407, 413 (1996 & Supp. 2000); MO. ANN. STAT. § 565.020 (West 1999) (specifying that premeditation is the only aggravating factor that makes a killing first-degree murder and thereby eligible for the death penalty); NEB. REV. STAT. §§ 28-303, 29-2523 (1995); N.C. GEN. STAT. § 14-17 (2000); 18 PA. CONS. STAT. ANN. § 2502 (West 1998 & Supp. 2000); 42 CONS. PA. STAT. ANN. § 9711 (West 1998 & Supp. 2000) (specifying that premeditation is the only aggravating factor that makes a killing first-degree murder and thereby eligible for the death penalty); S.D. CODIFIED LAWS §§ 22-16-4, 22-16-12, 22-6-1, 23A-27A-1, 23A-27A-4 (Michie 1998); TENN. CODE ANN. §§ 39-13-202, 39-13-204 (1998); VA. CODE ANN. §§ 18.2-31, 19.2-264.2 (Michie 1995 & Supp. 1999); WASH. REV. CODE ANN. §§ 9A.32.030, 10.95.020, 10.95.030 (West 2000 & Supp. 2000); WYO. STAT. ANN. §§ 6-2-101, 6-2-102 (Michie 1999); cf. MASS. ANN. LAWS ch. 265, §§ 1, 2, ch. 279, § 69 (Law. Co-op. 1992 & Supp. 2000) (adding extreme cruelty and subtracting commission of a felony from the list of aggravating circumstances that define first-degree murders eligible for the death penalty and making a much longer list of aggravating circumstances relevant to the decision to impose death in eligible cases); ARK. CODE ANN. §§ 5-10-101, 5-4-604 (Michie 1997) (using premeditation and a number of other aggravating circumstances to define capital murder and using a somewhat different list to determine which capital murders deserve death); COLO. REV. STAT. ANN. §§ 18-3-102, 16-11-103(5) (West 1999) (same); IDAHO CODE §§ 18-4003, 19-2515(h) (Michie 1997 & Supp. 1999) (same); OHIO REV. CODE ANN. §§ 2903.01, 2929.04 (Anderson 1999) (same); NEV. REV. STAT. §§ 200.030, 200.033 (1999) (adding additional aggravating circumstances beyond premeditation and commission of a felony that define first-degree murders eligible for the death penalty); N.M. STAT. ANN. § 30-2-1 (Michie 1994) (defining capital offense of first-degree murder to include depraved heart murder); see also R.I. GEN. LAWS §§ 11-23-1, 11-23-2 (Supp. 1999) (specifying that premeditated killing is first-degree murder, and that the additional presence of one of a number of specified aggravating circumstances justifies a sentence of life without parole.).

second-degree murder is based upon the traditional Pennsylvania model. The new paradigm is then employed to further subdivide first-degree murder into murders that are and are not death-penalty eligible. Thirty years after its first adoption, the jurisdictions that use the new paradigm actually outnumber those that rely exclusively on the traditional approach.

Although the new paradigm's influence on the law of homicide has been remarkable, it has been fundamentally incomplete. Its influence has been largely confined to the death penalty context and has been primarily used in determining who is eligible for it and, of those eligible, who deserves death. No state has yet adopted it as a framework for grading intentional homicides generally, particularly for determining which killings belong in the least serious offense category of manslaughter.

B. *Distinguishing Manslaughter from Murder*

While the new paradigm has had considerable impact on the grading of murders, it has essentially no impact on how the law draws the line between murder and manslaughter. Contemporary American jurisdictions follow one of two approaches in classifying intentional killings as murder or manslaughter. The overwhelming bulk of jurisdictions essentially follow the common law, which reduced an intentional killing from murder to manslaughter when the killer was in the throes of an excusably provoked state of passion.⁴⁷ Eleven states follow the Model Penal Code provision.⁴⁹

⁴⁷ Virginia does this explicitly. Capital murder consists of a premeditated killing accompanied by one of many specified aggravating circumstances. VA. CODE ANN. § 18.2-31 (Michie 1995 & Supp. 1999). First-degree murder consists of felony murder and premeditated killings unaccompanied by an aggravating circumstance. § 18.2-32. Second-degree murder encompasses other murders. *Id.*; see also WASH. REV. CODE ANN. § 10.95.020 (West Supp. 2000) (defining "aggravated murder" as premeditated killing or felony murder accompanied by one of a number of specified aggravating factors).

⁴⁸ ALA. CODE § 13A-6-3(2) (1994); ALASKA STAT. § 11.41.115(a) (2000); ARIZ. REV. STAT. § 13-1103 A.2 (West Supp. 1999); CAL. PENAL CODE § 192 (West 1999); GA. CODE ANN. § 16-5-2 (1999); IDAHO CODE § 18-4006 (Michie 1997); IND. CODE ANN. § 35-42-1-3 (West 1998); IOWA CODE ANN. § 707.4 (West 1993); KAN. STAT. ANN. § 21-3403(a) (1995); LA. REV. STAT. ANN. § 14:31 (West 1997); ME. REV. STAT. ANN. 17-A § 203 (West Supp. 1999); MD. CODE ANN., Crimes and Punishment § 387 (1996); MASS ANN. LAWS ch. 265, § 13 (Law. Co-op. 1992 & Supp. 2000); MICH. COMP. LAWS ANN. § 350.321 (West 1991); MINN. STAT. ANN. § 609.20(1) (West Supp. 2000); MISS. CODE ANN. § 97-3-35 (1999); MO. ANN. STAT. § 565.023 (West 1999); NEB. REV. STAT. § 28-305 (1995); NEV. REV. STAT. ANN. §§ 200.050, 200.060 (Michie 1999); N.J. STAT. ANN. § 2C:11-4 b.(2) (West 1995); N.M. STAT. ANN. § 30-2-3A (Michie 1994); N.C. GEN. STAT. § 14-18 (1993); OHIO REV. CODE ANN. § 2903.03 (Anderson 1999); OKLA. STAT. ANN. tit. 21, § 711 (West 1983); 18 PA. CONS. STAT. ANN. § 2503(a) (West 1998 & Supp. 2000); R.I. GEN. LAWS § 11-23-3 (1994) (incorporating common law manslaughter); S.D. CODIFIED LAWS § 22-16-15 (Michie 1998); TENN. CODE ANN. § 39-13-211 (1997); TEX. PENAL CODE ANN. § 19.02(d) (Vernon 1994) (treating heat-of-passion as a form of mitigated murder); VT. STAT. ANN. tit. 13,

Instead of incorporating the new grading paradigm apparent in the Code's own death penalty provisions, the Model Penal Code's manslaughter provision is a broadened version of the common law.⁵⁰

Like both the Pennsylvania model for dividing murder into degrees and the new paradigm, the common law offense of heat-of-passion manslaughter emerged in response to the death penalty. In seventeenth-century England, courts began to accept the notion that certain heat-of-passion killings lacked the "malice aforethought" necessary for murder and thus were not subject to the death penalty, then obligatory for murder. Malice aforethought was said to be lacking when, first, the killer had lost emotional control; second, the loss of control was triggered by some provocation on the part of the victim; third, the provocation was one recognized as adequate to cause an ordinary or reasonable person temporarily to lose control; fourth, the killer did not cool off between the provocation and the killing; and fifth, a reasonable person would not have cooled off.⁵¹

At common law, only a few kinds of provocations were adjudged sufficient to excuse the killer's state of passion and reduce the killing to manslaughter. Adequate provocations included only: a violent assault or serious legal wrong inflicted by the victim upon the killer's person; the killer's sight of his or her spouse in an adulterous act; the sight of another being falsely arrested or deprived of his liberty; or mutual

§ 2304 (Vernon 1998); VA. CODE ANN. § 18.2-35 (Michie 1995) (incorporating implicitly the common law concept of manslaughter); W. VA. CODE ANN. § 61-2-4 (Michie 2000) (incorporating common law of manslaughter); WYO. STAT. ANN. § 6-2-105 (Michie 1999) (same); *cf.* COLO. REV. STAT. ANN. § 18-3-103-2(b) (West 1999) (treating common law heat-of-passion killings as second-degree murder carrying less serious punishment than other second-degree murders); 720 ILL. COMP. STAT. ANN. § 5/9-2 (b) (West 1993); NEV. REV. STAT. ANN. §§ 200.050, 200.060 (Michie 1999); WIS. STAT. ANN. §§ 939.44, 940.01, 940.05 (1996 & Supp. 1999) (treating heat-of-passion as second-degree murder).

⁴⁹ ARK. CODE ANN. § 5-10-104(a)(1) (Michie 1997); CONN. GEN. STAT. ANN. §§ 53a-54a, 53a-55(a)(2) (West 1994); DEL. CODE ANN. tit 11, § 641 (1995 & Supp. 1998); HAW. REV. STAT. § 707-702(2) (1993 & Supp. 1999); KY. REV. STAT. ANN. §§ 507.020, 507.030(1)(b) (Michie 1990); MONT. CODE ANN. § 45-5-103 (1999) (renaming manslaughter "mitigated homicide"); N.H. REV. STAT. § 630:2 (1996); N.Y. PENAL LAW §§ 125.20, 125.25 (McKinney 1998); N.D. CENT. CODE § 12.1-16-01.2 (1997); OR. REV. STAT. § 163.118 (Supp. 1998); UTAH CODE ANN. §§ 76-5-203(3), 76-5-205 (1999) (classifying extreme emotional disturbance killings as a mitigated form of murder). *See* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 431 n.105 (1982) (listing twelve states as having adopted the Model Penal Code provisions).

⁵⁰ MODEL PENAL CODE § 210.3 cmt. 5, at 53-54 (1980) ("This provision includes the common-law doctrine of provocation but is not so limited in its scope.").

⁵¹ *See generally* MODEL PENAL CODE § 210.3, cmts. 1 & 5, at 44-46, 53-73 (1980); PILLSBURY, *supra* note 13, at 128-29; Ashworth, *supra* note 6, at 293; Dressler, *supra* note 49, at 426-27.

combat between the killer and the victim.⁵² The common law deemed provocations not fitting into one of these predetermined pigeonholes, such as insulting words or invasions of property or contract rights, insufficient as a matter of law to mitigate murder to manslaughter.⁵³

Among the large majority of states that continue to employ the common-law doctrine of heat-of-passion manslaughter, there is a trend toward broadening the provocation pigeonholes and giving juries greater discretion to determine the adequacy of the provocation.⁵⁴ A number of states also will reduce an intentional killing from murder to manslaughter in cases of "imperfect" self-defense.⁵⁵

The Model Penal Code provision incorporates and substantially expands the common-law manslaughter offense. A killing that would otherwise be murder is reduced to manslaughter when "committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."⁵⁶ Intentional killings that the common law reduces to manslaughter also qualify as manslaughter under the Model Penal Code. But the Model Penal Code provision significantly enlarges the category of manslaughter by dropping the common law

⁵² Ashworth, *supra* note 6, at 293; Dressler, *supra* note 49, at 426; see MODEL PENAL CODE § 210.3 cmt. 5, at 57–58 (1980).

⁵³ See MODEL PENAL CODE § 210.3 cmt. 5, at 57–58 (1980); LAFAVE & SCOTT, *supra* note 1, § 7.10(b), at 654–59; Dressler, *supra* note 49, at 428; Ashworth, *supra* note 6, at 293.

⁵⁴ See, e.g., *People v. Berry*, 556 P.2d 777, 780 (Cal. 1976); PILLSBURY, *supra* note 13, at 133–34. For instance, at common law the adultery pigeonhole applied only when one spouse actually witnesses the other spouse committing adultery. Verbal rather than oracular evidence of marital infidelity was not sufficient provocation. Some courts, however, have broadened the pigeonhole to encompass one spouse's "suddenly being told of his wife's infidelity." LAFAVE & SCOTT, *supra* note 1, § 7.10(b)(5), at 657. In fact, the common law rule that words alone may not suffice "has in many jurisdictions changed into a rule that words alone will sometimes do, at least if the words are informational (conveying information of a fact that constitutes a reasonable provocation when that fact is observed) rather than merely insulting or abusive words." *Id.* at 657–58.

The broadening of the common law pigeonholes blurs somewhat the difference between the common law and Model Penal Code approaches. As Professor Nourse has said, "Today, we are only safe in saying that in the law of passion, there lie two poles—one exemplified by the most liberal [Model Penal Code] reforms and the other by the most traditional categorical view of the common law. In between these two poles, a majority of states borrow liberally from both traditions." Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1342 (1997).

⁵⁵ See, e.g., 18 PA. CONS. STAT. ANN. § 2503(b) (West 1998 & Supp. 2000); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 812–13 (6th ed. 1995). A defense of self-defense is "imperfect" when the accused honestly but unreasonably believed that he or she needed to use deadly force to repel the imminent infliction of death or seriously bodily harm by an unlawful aggressor.

⁵⁶ MODEL PENAL CODE § 210.3 (1980).

requirements of an immediate provocation,⁵⁷ an excited emotional state,⁵⁸ a provocation that emanates from the victim,⁵⁹ and a provocation fitting into one of a few narrow pigeonholes.⁶⁰ Whether provoked or not, an extreme emotional or mental state will suffice so long as some reasonable explanation or excuse exists for it.

Although the new paradigm has clear implications for distinguishing murder from manslaughter as well as dividing murder into degrees, no jurisdiction yet has embraced them. First, the new paradigm's underlying approach implies that an array of mitigating circumstances should be considered in determining whether to classify an intentional killing as manslaughter rather than murder. It would seem that these should include most, if not all, of the numerous mitigating circumstances listed in the Model Penal Code death penalty provision and in death penalty statutes. Existing law, however, treats an excusable or understandable state of emotional or mental incapacity, and perhaps imperfect self-defense, as the only mitigating circumstances relevant to the choice between murder and manslaughter. Second, the new paradigm implies that aggravating and mitigating circumstances may coexist in any given case and that both should be considered in deciding the appropriate offense classification. Existing law, however, reduces an intentional killing based only on the mitigating circumstances it treats as sufficient and does not permit consideration of any aggravating circumstances that also happen to be present.

In sum, the law of homicide is in the midst of a transition. In determining which intentional killings are eligible for and warrant the death penalty, jurisdictions have adopted a new and fundamentally different grading paradigm. This paradigm, which constitutes an alternative approach of potentially general applicability, makes an expanded list of aggravating and mitigating circumstances relevant to the grade of the offense and allows for consideration of both types of circumstances in any given case. Although it so far has been confined largely to implementation of the death penalty,

⁵⁷ MODEL PENAL CODE § 210.3 cmt. 5, at 61 (1980).

⁵⁸ A mental or emotional disturbance not involving anger or excitement will qualify. MODEL PENAL CODE § 210.3 cmt. 5, at 53–54 (1980).

⁵⁹ MODEL PENAL CODE § 210.3 cmt. 5, at 60–61 (1980).

⁶⁰ MODEL PENAL CODE § 210.3 cmt. 5, at 61 (1980). The drafters of the code also broadened the offense of manslaughter in another way, by giving jurors enormous discretion. The common law limits the jury's role by specifying just a few provocations as legally adequate. The jury is not instructed on the offense of manslaughter unless the facts would permit it to find the existence of a triggering event on the shortlist of adequate provocations. In contrast, the Code does not define the capacious phrases of "extreme mental or emotional disturbance" or "reasonable explanation or excuse," which lie at the heart of its formulation. In fact, it provides that, "[t]he reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." The drafters explained that "[t]he word 'situation' is designedly ambiguous" and that the ambiguity should be resolved by "the ordinary citizen in the function of juror assigned to resolve the specific case." MODEL PENAL CODE § 210.3 cmt. 5, at 61 (1980).

its use has been gradually spilling over into other contexts. So far obscured by the pitched battle over the death penalty, the sea change now brewing in the law of homicide deserves notice and critical scrutiny.

II. TRADITIONAL LAW AND FIRST-DEGREE MURDER

Should the shift from the traditional to the new grading paradigm be resisted or accelerated? This Part begins an answer by evaluating how traditional law draws the line between degrees of murder. Under the traditional paradigm, an intentional killing is classified as first-degree or capital murder only if it was premeditated or committed in the course of a dangerous felony. This Part has no quarrel with traditional law insofar as it employs the felony murder rule to elevate an intentional killing from second to first-degree murder.⁶¹ However, this Part does press two fundamental objections against the traditional way of identifying the most serious intentional homicides. First, the traditional approach is underinclusive because other aggravating factors can justify assigning such a killing to the most serious group of homicides. Second, it is overinclusive both because premeditation sometimes has a mitigating significance, which traditional law perversely treats as aggravating, and because premeditation sometimes coexists with mitigating factors that justify assigning the homicide to a less serious category.

⁶¹ In most jurisdictions, the felony murder rule has two principal functions. The first function is to elevate an *intentional* (but unpremeditated) killing that would otherwise be second-degree murder to first-degree murder. As indicated in the text, this first function of the felony murder, which the new paradigm incorporates by treating contemporaneous commission of a dangerous felony as an aggravating circumstance, is justifiable. See Herbert Wechsler & Jerome Michael, *A Rationale for the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1271–72 (1937); Givelber, *supra* note 13, at 385 (conceding that despite other criticisms of the felony murder rule principled arguments for this function of rule “may well exist”). Concomitant commission of a felony dangerous to human life indicates a greater disrespect for human life and therefore adds to the punishment the offense deserves as a matter of retributive justice. See *infra* notes 72–73 & accompanying text for a discussion of a retributivist view of criminal punishment. The offender’s willingness to put human life at risk also indicates an increased dangerousness and a greater need for incapacitation, thereby supporting increased punishment on utilitarian grounds. See *infra* notes 67–71 & accompanying text for a discussion of utilitarian views of criminal punishment.

The second function of the felony murder rule is to elevate to first-degree murder an *unintentional* killing that otherwise generally would be classified as a lesser degree of homicide or not criminal homicide at all. The scholarly literature generally condemns this second function of the felony murder. See, e.g., II MODEL PENAL CODE § 210.2 cmt. 6, at 37 (1980) (“Principled argument in favor of the felony-murder doctrine is hard to find.”); Givelber, *supra* note 13, at 384–85; George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 427–28 (1981). But see David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. L. & PUB. POL’Y 359, 361–63 (1985). Because it relates to the classification of unintentional homicides, this aspect of the felony murder rule is beyond this article’s purview.

In addition to finding clear support in the accepted purposes of criminal punishment, these criticisms are already implicit in the behavior of American juries and judges. The problem here, then, lies not so much in changing existing practice as it does in rationalizing it and closing a cynicism-breeding gap that now exists between the law on the books and the law in practice.

A. *Other Aggravating Factors*

Defendant [Anderson] . . . had been living for about eight months with a Mrs. Hammond and her three children, [including] . . . the victim Victoria, aged 10. . . [H]e had been drinking heavily . . .

....

. . . The evidence established that the victim's torn and bloodstained dress had been ripped from her, that her clothes, including her panties out of which the crotch had been ripped, were found in various rooms of the house, that there were bloody footprints matching the size of the victim's leading from the master bedroom to Victoria's room, and that there was blood in almost every room including the kitchen, the floor of which appeared to have been mopped.

....

Over 60 [knife-inflicted] wounds, both severe and superficial, were found on Victoria's body. The cuts extended over her entire body, including one extending from the rectum through the vagina, and the partial cutting off of her tongue. Several of the wounds, including the vaginal lacerations, were post mortem.⁶²

The killing in the gruesome case described above clearly was not premeditated within the ordinary meaning of that term, which connotes planning.⁶³ The defendant Anderson was quite drunk. As indicated by the number and the placement of the wounds, he was gripped by violent sexual impulses. His efforts to conceal the crime were partial, clumsy, and wholly ineffectual. Taken together, these facts compel the conclusion that he killed impulsively rather than according to some pre-design. The California Supreme Court, which assigned "premeditation" its ordinary meaning, accordingly held that the evidence was legally insufficient to support the jury's verdict of first-degree murder.⁶⁴

Although the killing was impulsive rather than planned, it possessed a number of aggravating features. First, the victim was a vulnerable and entirely innocent ten-

⁶² *People v. Anderson*, 447 P.2d 942, 944, 945 (Cal. 1968) (en banc).

⁶³ The dictionary definition of "premeditation" is "consideration or planning of an act beforehand." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 919 (10th ed. 1993); see also ROLLIN M. PERKINS, CRIMINAL LAW 92 (2d ed. 1969); ROYAL COMMISSION ON CAPITAL PUNISHMENT: 1949-1953 174 n.8 (1953) [hereinafter ROYAL COMMISSION].

⁶⁴ The California Supreme Court also held that the evidence was insufficient to establish that the defendant had committed first-degree felony murder because the evidence that the defendant had committed a felonious sex offense was lacking. *Anderson*, 447 P.2d at 953-55.

year-old child. Second, Anderson, who had been living in the household for some eight months with the child's mother, apparently occupied a quasi-parental role respecting the child victim. Third, the evidence of a struggle and the extreme brutality of the killing indicate a callous and inhuman indifference to the child's suffering. Fourth, the manner of the killing suggests that Anderson wished to abuse the child to satisfy his own selfish appetite for sex and/or violence. These aggravating factors—the vulnerability of the victim, the killer's duty of care to the victim, the extreme brutality of the killing, and the attempted sexual abuse of the victim—lend overwhelming support to the jury's decision to put the killing in the most serious offense category.

Cases such as *Anderson* unfortunately are not an aberration. It is not difficult to find cases in which the killing was unplanned but involved aggravating circumstances such as a vulnerable victim, a parental relationship between the killer and the victim, or extreme cruelty.⁶⁵ As *Anderson* illustrates, it makes very little sense in such cases to focus only on the absence of planning, treating it as a circumstance that mitigates murder from first to second-degree, while categorically ignoring the presence of numerous other aggravating factors. As Professor Fletcher has written, "[T]here is obviously a flaw in the criterion of 'premeditation and deliberation.' It takes one of several grounds that are sufficient to treat a homicide as among the most wicked, and takes that one ground to be necessary to the exclusion of all others."⁶⁶

The accepted purposes of criminal punishment bolster the conclusion that a broader range of aggravating circumstances should be taken into account. Consider first the utilitarian view of criminal punishment, which sees the criminal process as a tool for achieving beneficial future consequences through general and specific deterrence, rehabilitation, and incapacitation.⁶⁷ From a utilitarian view, it is not clear that premeditation has a strongly aggravating significance. It is said that deterrence supports an increased penalty for premeditated killings on the ground that those who deliberate beforehand might include the added penalty in their deliberative calculus and be deterred by it.⁶⁸ However, it seems doubtful that the marginal influence of an

⁶⁵ For instance, *Anderson* is just one of many cases in which a person occupying a parental role brutally killed a vulnerable child, the jury understandably returned a verdict of first-degree murder, and an appellate court overturned the verdict on the ground that evidence of premeditation is lacking. See also *Midgett v. State*, 729 S.W.2d 410, 411, 415 (Ark. 1987) (father killed his eight-year-old son by brutally and repeatedly beating him); *Pannil v. Commonwealth*, 38 S.E.2d 457, 463 (Va. 1946); *People v. Ingraham*, 133 N.E. 575, 576–77 (N. Y. 1921); H.D. Warren, Annotation, *Criminal Liability for Excessive or Improper Punishment Inflicted on Child by Parent, Teacher, or One in Loco Parentis*, 89 A.L.R. 2d 396, 417–18 (1963) (discussing *Ingraham* and *Pannil*).

⁶⁶ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 254 (1978).

⁶⁷ See Kent Greenawalt, *Punishment*, in 4 *ENCYCLOPEDIA, supra* note 1, at 1336, 1340–41.

⁶⁸ See *State v. Guthrie*, 461 S.E.2d 163, 181 (W.Va. 1995); *Austin v. United States*, 382 F.2d 129, 134 (D.C. Cir. 1967); Givelber, *supra* note 13, at 384.

increased penalty will be very great. Will many offenders really reason that a killing is worth committing if the expected penalty is, say, only fifteen years instead of twenty-five?⁶⁹

More important, even if deterrence does support an increased penalty for premeditated killings, the need for incapacitation can justify also putting impulsive killings in the most serious offense category. Those who have violent impulses they cannot control pose special dangers and stand in need of lengthy incapacitation, particularly when, as in *Anderson*, they are grossly insensitive to the interests of others. As the drafters of Model Penal Code famously declared, "[t]he suddenness of the killing may simply reveal callousness so complete and depravity so extreme that no hesitation is required."⁷⁰

As it is now employed, the new paradigm uses several aggravating circumstances that indirectly measure the need for incapacitation. Typical aggravating circumstances include the infliction of exceptional cruelty, the youth or vulnerability of the victim, knowing creation of great risk of death to many persons, and previous conviction of violent felonies.⁷¹ The presence of one or more of these circumstances tends to indicate a greater need for incapacitation because the defendant has unusually strong violent impulses, is unable to control those impulses, or is unusually insensitive to the interests of others. *Anderson* exemplifies a case in which aggravating circumstances such as these strongly evidence a need for incapacitation that justifies putting an impulsive killing in the most serious offense category. The utilitarian school of thought, which includes considerations of incapacitation as well as general deterrence, does not support punishing premeditated killings more harshly as a category than impulsive ones.

Nor does retributivism, the other main school of thought about purposes of criminal punishment, support punishing premeditated killings more harshly.⁷² Retributivism seeks to punish the offender according to the moral wrongfulness of his act regardless of any future benefits and costs flowing from the punishment. Under the retributivist view, which derives from the philosophy of Immanuel Kant, the wrongfulness of an act is measured by the degree to which it fails to accord proper

⁶⁹ Cf. Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1192 (1981) (making a similar point about the deterrent effect of the death penalty versus life imprisonment).

⁷⁰ MODEL PENAL CODE § 210.6 cmt. 4(b), at 127 (1980).

⁷¹ See *supra* notes 37 and 39.

⁷² According to Professor Dolinko, "retributivism, once treated as an irrational vestige of benighted times, has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment." David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1992).

respect to others.⁷³ As the facts of *Anderson* powerfully illustrate, impulsive as well as premeditated killings can evidence the highest degree of disrespect for others.⁷⁴ In stabbing the victim repeatedly and chasing her around the house, Anderson demonstrated cruel insensitivity to her suffering. In killing, torturing, and seeking to abuse her, he gave absolute priority to gratification of his own violent and sexual impulses and no weight at all to her interests. Judged from the standpoint of retributivism, the new paradigm is right to rely on aggravating circumstances such as the torture of victim or knowing exposure of a great number of persons to a risk of death. Such aggravating circumstances constitute relevant measures of the degree of a killer's disrespect for the interests of others.

Reliance on aggravating circumstances other than premeditation also squares with the limited evidence concerning the moral judgments of jurors.⁷⁵ The Capital Juror Project in South Carolina⁷⁶ asked jurors who sat in forty-one capital murder cases to identify which aggravating and mitigating circumstances they did or would find most persuasive in deciding whether to impose the death penalty. The interviews revealed that the jurors regarded extreme brutality and the status of the victim as a child as, by far, the most important aggravating circumstances.⁷⁷ By contrast, the

⁷³ See Greenawalt, *supra* note 67, at 1338; Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 180 (Ferdinand Schoeman ed., 1987) (explaining that retributivists are "committed to the principle that punishment should be graded in proportion to [moral culpability]").

⁷⁴ Professor Pillsbury observes that "the [*Anderson*] case leads us to doubt whether an impassioned decision to kill is necessarily less culpable than a dispassionate one." PILLSBURY, *supra* note 13, at 104. However, a serious deficiency in his own proposal for reform is that it is not at all clear that the *Anderson* killing qualifies as a case of aggravated murder. That proposal defines the most serious category as "the purposeful killing of another human being for profit, to further a criminal endeavor, to affect public policy or legal processes, because of animosity toward the victim's race, religion, ethnicity, sex or sexual orientation, or to assert cruel power over another." *Id.* at 110. The only aggravating motive that potentially applies on the facts of *Anderson* is the assertion of cruel power over another. No doubt it would be difficult for the prosecution to prove and the jury to find that Anderson was motivated by a desire to assert cruel power over another. It is quite doubtful that Anderson himself understood his motivations. More to the point, one does not need to understand Anderson's subjective motivation to appreciate the strong retributivist and utilitarian justifications for putting his killing in the most serious offense category. Whatever his motivation, he demonstrated gross insensitivity to the interests of others as well as a great potential for future dangerousness.

⁷⁵ Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998).

⁷⁶ The Project is "a National Science Foundation-funded multistate research effort." *Id.* at 1539; see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L. J. 1043, 1077-85 (1995) (examining a multidisciplinary study of how jurors make their life or death sentencing decisions).

⁷⁷ Garvey, *supra* note 75, at 1555-56; see also DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 56 (1990) (reporting a study of Georgia death penalty cases revealing that

presence or absence of premeditation had a very equivocal impact on the jurors. In fact, the jurors who reported that, like traditional law, they regarded the absence of premeditation as mitigating were outnumbered by the jurors who regarded a killing's impulsivity as aggravating.⁷⁸

These views bolster the case for adopting legal standards that accommodate aggravating circumstances other than premeditation. It is true that legal standards need and should not slavishly follow the sentiments of jurors. But, given that a principal purpose of the criminal jury is to help assure that the exercise of governmental coercion comports with basic community values,⁷⁹ their views deserve some general deference.⁸⁰ Here, juror views harmonize rather than conflict with the purposes of criminal punishment, as strong retributive and utilitarian reasons exist for treating extreme brutality and the victim's youth as aggravating circumstances.⁸¹ The argument for deferring to such views is compelling.

extreme brutality and commission during a contemporaneous felony were the factors that most often resulted in death penalty); McCord, *supra* note 13, at 583 (finding that of the twenty-five then most recent Georgia cases in which the defendant had been sentenced to death, fifteen involved a particularly repulsive method of killing).

⁷⁸ Garvey, *supra* note 75, at 1555 (noting that thirty-seven percent of jurors said that the absence of premeditation did or would have no influence on their decision).

⁷⁹ See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 157 (1973); *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968); HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 498 (1966).

⁸⁰ See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 6 (1995).

⁸¹ See *supra* notes 71–74 and accompanying text. In this regard, it is worth noting that influential law reform commissions in both the United States and Great Britain have recommended against defining the most serious category of intentional murders based on premeditation.

The drafters of the Model Penal Code rejected the judgment that “the person who plans ahead is worse than the person who kills on sudden impulse.” MODEL PENAL CODE § 210.6 (1980).

In 1949, a Royal Commission in Great Britain reached the same conclusion. It unanimously rejected a proposal to divide murder into degrees based on the presence or absence of premeditation. According to the Commission, “a sudden killing may be the direct expression of an incorrigibly vicious nature, while a premeditated and deliberate murder may be among the most excusable.” ROYAL COMMISSION, *supra* note 63, at 175. Defining first-degree murder in terms of premeditation is “at once too wide” because some premeditated murders are accompanied by important mitigating factors “and too narrow” because some unpremeditated murders “involve even more diabolical cruelty and ferocity.” *Id.* (quoting J. STEPHEN, *HISTORY OF THE CRIMINAL LAW* 94 (1883)).

A few years after publication of the Royal Commission's report, Parliament enacted the Homicide Act. The Act defined the most serious category of murders in terms of several aggravating factors. The death penalty, which has since been abolished, was reserved for murders committed (a) in the course of or furtherance of theft; (b) by shooting or causing an explosion; (c) while resisting, avoiding or preventing arrest or escape from lawful custody; (d) against a police officer; (e) by a prisoner killing a prison officer; or (f) by one who had been convicted of murder on a different occasion. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 §§ 5–6 (Eng.); see D.W. Elliot,

To a surprising degree, existing law implicitly accepts the conclusions that aggravating circumstances other than premeditation ought to influence the grade of the offense and that the traditional paradigm arbitrarily overlooks such circumstances. Although a majority of state homicide statutes define first-degree murder in terms of premeditation,⁸² appellate courts in a great many of these jurisdictions decline to give premeditation its ordinary meaning of planning.⁸³ They either allow trial courts to instruct juries in ways that eliminate the term's significance or uphold convictions for premeditated murder in the absence of genuine evidence of planning.⁸⁴ Such

The Homicide Act, 1957, 1957 CRIM. L. REV. 282, 288-90 (1957). Premeditation was not included in the list of aggravating factors that define the most serious class of murders.

⁸² See *supra* note 20.

⁸³ See, e.g., *United States v. Chagra*, 638 F. Supp. 1389, 1399 (W.D. Tex. 1986) (noting the "more widespread judicial tendency" of interpreting premeditation and deliberation not to "call for elements that the word[s] normally signif[y]"); PERKINS, *supra* note 63, at 92; Brenner, *supra* note 3, at 280 ("To an alarming extent . . . the courts have not given these words ['deliberate and premeditated'] their literal meaning."); ALA. CODE § 13A-6-2 (1994) (commentary) ("Often a finding of a conscious intent to kill is deemed sufficient for, or indistinguishably close to, premeditation and deliberation.").

⁸⁴ At one extreme end of the spectrum, the meaning of "premeditation" has been equated with "intentional" so that there is no meaningful analytical distinction between a premeditated intentional killing, which is first-degree murder, and an unpremeditated intentional murder, which is second-degree murder. In *State v. Schrader*, 302 S.E.2d 70, 75 (W. Va. 1982), the West Virginia Supreme Court declared that "the meaning of 'premeditated' as used in the statute was [and is] essentially 'knowing' and 'intentional.'" The *Schrader* court followed early decisions in Pennsylvania and Virginia to the same effect and quoted with approval Justice Cardozo's oft-repeated statement that "what we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy." *Id.* (quoting Benjamin N. Cardozo, *What Medicine Can Do For Law*, in *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 70, 100 (1931)). But see *State v. Guthrie*, 461 S.E.2d 163, 182 (W. Va. 1995) (overruling *Schrader* insofar as it equates "premeditation" with mere intent).

Consistent with the West Virginia Supreme Court's explicit holding in *Schrader*, many jurisdictions do not require that any appreciable time elapse between the formation and the execution of the intent to kill. See, e.g., S.D. CODIFIED LAWS §22-16-5 (Michie 1998); *Commonwealth v. Carroll*, 194 A.2d 911, 916 (Pa. 1963); *Hammil v. People*, 361 P.2d 117, 122 (Colo. 1961); *Jackson v. State*, 202 S.W. 683 (Ark. 1918); LAFAVE & SCOTT, *supra* note 1, § 7.7(a), at 643 n.8; Lee R. Russ, Annotation, *Modern Status of the Rules Requiring Malice "Aforethought," "Deliberation," or "Premeditation," As Elements of Murder in the First-degree*, 18 A.L.R.4th 961 (1982) (listing cases holding that no particular time need elapse for premeditation to exist). As Professor Perkins has observed, such an interpretation tends to equate "premeditated" with "intended":

Those who first employed this word in this type of first-degree murder statute undoubtedly had in mind a malicious scheme thought out well in advance of the fatal act itself. And unless we are willing to ignore the plain meaning of words we are forced to recognize that a fatal act might be intentional and yet entirely too hasty to be deliberate and premeditated. The notion that a fully-

definitional legerdemain is sometimes attributed to inherent vagueness in the concept of premeditation.⁸⁵ However, the concept of planning is neither vague nor difficult. Dictionaries clearly define “premeditation” and scholars have no great difficulty with the distinction between a planned and unplanned intent to kill.⁸⁶ Despite occasional protestations to the contrary, it should be clear that many courts are diluting the statute’s plain meaning.⁸⁷

The best explanation for this widespread practice is discomfort with the conclusion that premeditation is the *sine qua non* of killings that deserve the most severe punishment. Courts thus give the jury “unstructured discretion”⁸⁸ to distinguish between first and second-degree intentional murders. This has the advantage of allowing classification decisions to take implicit account of other aggravating circumstances, which at least arguably is what legislatures intended anyway.⁸⁹ But the reduction of premeditation and deliberation to a “mystifying cloud

formed intent is always deliberate and premeditated, no matter how short the time between the first thought of the matter and the execution of the plan, is preposterous. And yet some courts have taken just such a position.

PERKINS, *supra* note 63, at 92; *see also* Mathew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 154–55 (1999); Brenner, *supra* note 3, at 280–85.

⁸⁵ Some courts quote Cardozo for the proposition that the premeditation criterion is hopelessly vague. *See, e.g., Schrader*, 302 S.E.2d at 75. But if it is meant to suggest that Cardozo thought that the term “premeditation” itself is unduly vague, the quote is taken out of context.

Cardozo did write that the “distinction [between premeditated and unpremeditated intent] is too vague to be continued in our law” and that “I am not at all sure that I understand it myself after trying to apply it for many years.” Cardozo, *supra* note 84, at 99, 101. But he was speaking of the meaning of premeditated and deliberate as those phrases had been defined by judicial decisions. Those decisions, he observed, “ha[ve] given to these words a meaning that differs to some extent from the one revealed upon the surface” of the statute. *Id.* at 97. He was referring, in particular, to decisions holding that an intent to kill may be premeditated and deliberate without “any particular length of time . . . interven[ing] between the volition and act,” *id.* at 98, and that “seconds may be enough.” *Id.*

For Cardozo, then, the vagueness problem arose not from indefiniteness in the ordinary meaning of premeditation but rather from judicial dilution of that meaning.

⁸⁶ *See supra* note 63.

⁸⁷ FLETCHER, *supra* note 66, § 4.2.3, at 254–55; LAFAYE & SCOTT, *supra* note 1, § 7.7(a), at 643; PERKINS, *supra* note 63, at 92; Brenner, *supra* note 3, at 280.

⁸⁸ *People v. Morrin*, 187 N.W.2d 434, 447 (Mich. App. 1971); *see also Guthrie*, 461 S.E.2d at 181 n.22.

⁸⁹ It seems quite doubtful that in enacting murder statutes legislatures focused squarely on whether an unpremeditated intentional homicide might deserve to be placed in the most serious category of murder based on other aggravating factors. If they had done so, they at least arguably would have concluded that some such homicides do deserve the most serious offense category. This conclusion creates a tension between the statute’s literal language, which focuses on premeditation, and its overriding purpose of classifying intentional homicides according to their seriousness. A court legitimately could resolve this tension in favor of statutory purpose, giving

of words"⁹⁰ has the disqualifying disadvantages of breeding disrespect for statutory language⁹¹ and of giving jurors unguided discretion.

The new paradigm reflects a better approach. It explicitly allows aggravating circumstances other than premeditation to be taken into account. Rather than giving jurors uncabined discretion, it hinges grading decisions on aggravating circumstances specified by statute. In so doing, it involves legislatures in the grading process, better promotes consistency of decisions and respect for statutory language, and more effectively reflects the purposes of criminal punishment and the moral sensibilities of jurors.

B. *Other Mitigating Factors*

Consider the facts of *State v. Forest*:

Defendant's father, who had previously been hospitalized, was suffering from numerous serious ailments, including severe heart disease, hypertension, a thoracic aneurysm, numerous pulmonary emboli, and a peptic ulcer. By the morning of December 23, 1985, his medical condition was determined to be untreatable and terminal. Accordingly, he was classified as "No Code," meaning that no extraordinary measures would be used to save his life

On 24 December 1985, defendant went to the hospital to visit his ailing father. Alone at his father's bedside, defendant began to cry and to tell his father how much he loved him. His father began to cough, emitting a gurgling and rattling noise. Extremely upset, defendant pulled a small pistol from his pants pocket, put it to his father's temple, and fired. He subsequently fired three more times and walked out in the hospital corridor, dropping the gun to the floor just outside his father's room.⁹²

This tragic case reveals another kind of error associated with traditional legal classification of intentional homicides. In addition to overlooking important aggravating factors, the traditional paradigm fails to appreciate that compelling mitigating circumstances sometimes accompany premeditation and that premeditation itself sometimes possesses mitigating significance.

jurors the freedom to characterize unplanned intentional homicides as first-degree murder based on aggravating factors other than premeditation.

⁹⁰ CARDOZO, *supra* note 84, at 100.

⁹¹ It would be one thing if these decisions said openly that, based on the tension between the purpose of the first-degree murder statute and its literal language, courts are justified in departing from that language. But instead of openly acknowledging their departure, courts purport to interpret "premeditation" faithfully. The simultaneous departure from the text and the pretense of following it carry the troubling messages that courts are not bound by statutory text and that insincerity is an acceptable feature of judicial reasoning.

⁹² 362 S.E.2d 252, 253-54 (N.C. 1987).

The reported facts, though not entirely unequivocal, indicate that Forest did “premeditate” the killing. Having learned of his father’s hopeless diagnosis the day before, he had a prior motive to kill⁹³ and an opportunity for reflection. Further, Forest carried a concealed pistol into the hospital, demonstrating that he had planned the killing.⁹⁴ Planning is also evidenced by Forest telling his father how much he loved him and crying immediately before the killing. The North Carolina Supreme Court accordingly upheld the jury’s verdict of first-degree premeditated murder.

By putting the *Forest* killing into the most serious offense category based on premeditation, the traditional paradigm ignores at least two compelling mitigating circumstances. First, the reported facts raise an inference that Forest, who loved his father, held a sincere belief that the killing was in his father’s best interests. This contrasts quite sharply with *Anderson*, where the defendant displayed extreme indifference to the interests of his ten-year-old victim by trying to sexually abuse her and repeatedly slashing her with a machete as he chased her around the house.⁹⁵ Second, in *Forest* the premeditation was itself a mitigating factor. Forest’s reflection on whether to kill his father, as well as his crying before and after the killing, indicate moral anguish. Had he killed unhesitatingly and without reflection, the killing would have been more reprehensible because of its callous insensitivity to the value of life.

The purposes of criminal punishment reinforce the conclusion that premeditated killings like those in *Forest* do not belong in the most serious offense category. From a retributivist perspective, Forest’s premeditated mercy killing of his father constituted a qualitatively less serious infringement of autonomy than did Anderson’s unpremeditated but brutal killing of the child with whom he shared the household. Forest believed—correctly, it appears—that his father had permanently lost all autonomy. He had grounds for believing not only that the killing did not violate his father’s nonexistent autonomy, but also that perhaps the killing was consistent with respect for his father’s autonomy. In light of his father’s dire medical prognosis, Forest apparently concluded that the killing was in his father’s best interests and, perhaps, that his father would have chosen to die had he been able to make the choice.⁹⁶ In sharp contrast, Anderson’s killing cannot conceivably be seen as

⁹³ In jurisdictions such as California, which give “premeditation” its ordinary meaning of planning, evidence of a prior motive to kill is relevant evidence of premeditation. *See* *People v. Anderson*, 447 P.2d 942, 949 (Cal. 1968) (en banc).

⁹⁴ *See, e.g., United States v. Brooks*, 449 F.2d 1077, 1084 (D.C. Cir. 1971) (stating that bringing a deadly weapon to the scene of the crime is relevant evidence of premeditation); *State v. Henson*, 562 P.2d 51, 56 (Kan. 1977) (holding that the use of a deadly weapon is one circumstance to be considered to infer deliberation) (citing *State v. Hamilton*, 534 P.2d 226, 232 (Kan. 1975)).

⁹⁵ *See supra* notes 62–64 and accompanying text.

⁹⁶ For arguments that voluntary euthanasia can be consistent with and is perhaps required by respect for individual autonomy, see, for example, RONALD DWORKIN, *LIFE’S DOMINION* 190–92, 213 (1993).

consistent with his victim's autonomy. An offense classification sensitive to retributivist concerns would reflect the obvious conclusion that unpremeditated killings such as those in *Anderson* are worse and more deserving of punishment than premeditated killings such as those in *Forest*.

Utilitarian considerations produce a similar result. In contrast with *Anderson*, whose impulsivity and brutality strongly suggested a need for incapacitation, *Forest* hardly can be viewed as posing great dangers to others unless incarcerated. One might argue that persons who premeditate, as *Forest* did, are more likely to be deterred by the threat of criminal sanctions.⁹⁷ Still, even assuming that an increased penalty for premeditated killing has some deterrent effect, it does not follow that premeditated killings such as that in *Forest* should be punished more severely than the *Anderson* killing. It would seem that the social harm caused by the *Anderson* killing and the need to deter that harm were far greater than in *Forest*. In addition, there is no reason to believe that an increased interest in deterrence will always predominate over the reduced need for incapacitation suggested by mitigating factors such as those in *Forest*. Conversely, there is no reason to believe that any reduced interest in deterrence which flows from a killer's impulsivity will predominate over the increased need for incapacitation suggested by aggravating factors such as those present in *Anderson*.

The new paradigm avoids the serious flaws in the traditional approach highlighted by cases such as *Anderson* and *Forest*. Used as a basis for grading homicides generally, the new paradigm would change the unacceptable outcome in *Anderson* by permitting consideration of a fuller range of aggravating circumstances. It would likewise permit a different result in *Forest*. In contrast with the traditional paradigm's categorical approach, the statutes embodying the new paradigm treat premeditation as an aggravating circumstance only when it indicates an unusually extreme and blatant exaltation of the killer's interest and devaluation of the victim's interests, as when the killing was for hire or was otherwise committed for pecuniary gain.⁹⁸ The purposes of criminal punishment, the practices of courts and jurors, and cases such as *Anderson* and *Forest* all strongly suggest that the new paradigm provides a better analytical framework for identifying the most serious intentional homicides.

III. TRADITIONAL LAW AND MANSLAUGHTER

This Part turns its attention to the line between murder and manslaughter. Under the traditional grading paradigm, an excusable emotional or mental disturbance suffices to place an intentional homicide into the least serious offense category.⁹⁹

⁹⁷ See *supra* notes 68–69 and accompanying text.

⁹⁸ See *infra* note 194 and accompanying text.

⁹⁹ See *supra* Part I.B.

Under the common law approach embraced by most modern American jurisdictions, an intentional killing that would otherwise count as murder is reduced to manslaughter when the perpetrator was in the throes of a passion precipitated by some "adequate" provocation. The Model Penal Code formulation, which a substantial minority of states accept, expands the circumstances in which an unlawful intentional killing may be reduced from murder to manslaughter. It provides that an unlawful intentional killing becomes manslaughter if "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."¹⁰⁰

Each of these formulations suffers from shortcomings that mirror those of first-degree premeditated murder, discussed previously. The focus is on only one consideration, while other aggravating and mitigating considerations of equal or greater significance are ignored. This unduly narrow focus produces indefensible results, often in cases involving intra-familial violence. In its structure, if not its content, the new grading paradigm promises to do better.

A. Mitigation

Two cases help illustrate that traditional doctrines of mitigation are both too broad and too narrow. Consider first the facts of *Commonwealth v. Schnopps*.¹⁰¹ Six months before the killing, the defendant's wife had told him that she did not love him anymore and wanted a divorce. Three weeks before the killing, the defendant, Schnopps, had confirmed his suspicions that his wife was seeing another man, and his wife moved out of the house.¹⁰²

Schnopps [went to where his wife was living] asked [her] to come to their home and talk over their marital difficulties. Schnopps told his wife that he wanted his children at home, and that he wanted the family to remain intact. Schnopps cried during the conversation, and begged his wife to let the children live with him and to keep their family together. His wife replied, "No, I am going to court, you are going to give me all the furniture, you are going to have to get the Hell out of here, you won't have nothing." Then, pointing to her crotch, she said, "You will never touch this again, because I have got something bigger and better for it."

¹⁰⁰ § 210.3(1)(b). For a discussion of both the common law and Model Penal Code approaches, see *supra* Part I.B.

¹⁰¹ 417 N.E. 2d 1213 (Mass. 1981).

¹⁰² *Id.* at 1215.

On hearing those words, Schnopps claims that his mind went blank, and that he went "berserk." He went to a cabinet and got out a pistol he had bought and loaded the day before, and he shot his wife and himself.¹⁰³

Now consider *The Queen v. Dudley & Stephens*.¹⁰⁴ Four shipwrecked crewmen, including defendants Dudley and Stephens, had been in a lifeboat for nineteen days and had eaten nothing for eight days.¹⁰⁵ Dudley and Stephens discussed killing the youngest, who was in a much weaker state than the other three.¹⁰⁶ They put off the killing, hoping to be rescued.¹⁰⁷ When no vessel was in sight the next day and they felt themselves on the verge of starvation, the two killed the youngest, and the remaining three fed upon his body for four days until they were rescued.¹⁰⁸ The jury found that unless the youngest had been killed, there was no appreciable chance that any of the others would have survived until their rescue four days later.¹⁰⁹

As these two cases illustrate, the traditional paradigm is both overinclusive and underinclusive in identifying mitigating factors that may reduce murder to manslaughter. It mitigates murder to manslaughter based on circumstances lacking real mitigating significance. The Massachusetts Supreme Court treated the killing in *Schnopps* as an appropriate candidate for manslaughter because Schnopps was reminded of his wife's "infidelity."¹¹⁰ The Court so held even though the victim had ended the relationship weeks before, had repeatedly refused to reconcile, had moved out of their house, and was in the process of securing a divorce.¹¹¹ In addition to relying upon dubious mitigating circumstances such as these, existing law takes no cognizance of far more powerful mitigating circumstances. For example, under the traditional paradigm, the life-boat killing in *Dudley & Stephens* is a classic case of first-degree premeditated murder and could not be a candidate for manslaughter even though the jury found the killing necessary to save three lives.

¹⁰³ *Id.* On appeal, the court held that the trial court erred in not instructing the jury on the possible heat-of-passion voluntary manslaughter verdict. *Id.* at 1216.

¹⁰⁴ 14 Q.B.D. 273, 273-74 (1884).

¹⁰⁵ *Id.* at 274.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 275.

¹¹⁰ Commonwealth v. Schnopps, 417 N.E. 2d 1213, 1216 (Mass. 1981).

¹¹¹ *Id.* at 1215-16.

1. *Overinclusivity*

The provocations the common law recognizes as adequate to excuse passion and to reduce murder to manslaughter trace back to an earlier era. Several are now of very questionable mitigating significance. For instance, the common law rule that mutual combat or brawling constituted adequate provocation reflects the notion that physical violence, including dueling to the death, is an understandable and excusable way to defend against affronts to one's personal honor.¹¹² This notion, however, has weakened considerably as reflected by the duty to retreat, which many jurisdictions now impose before a person may use deadly force in self-defense.¹¹³

The common law rule that witnessing a spouse's infidelity constitutes adequate provocation¹¹⁴ seems similarly outmoded. A retributivist rationale can be seen at work in the common law rules governing which provocations may reduce murder to manslaughter. Common law courts recognized as adequate only those provocations that, at the time, constituted serious legal wrongs. From a retributivist view, the wrongfulness of the victim's conduct serves partially to justify the killing and to diminish the inherent wrongfulness of the defendant's act.¹¹⁵ While adultery was regarded as a serious legal wrong when the common law rule treating it as adequate provocation first developed,¹¹⁶ it is no longer so regarded. Even where legal proscriptions against adultery remain, they are no longer enforced.¹¹⁷ In addition, in some cases, such as *Schnopps*, the defendant who kills an adulterous spouse is killing a parent of his or her children and/or has failed to respect the spouse's legal right to divorce and to change intimate partners. As argued below, such circumstances ought to be treated as aggravating, not mitigating.¹¹⁸ In contemporary circumstances, no

¹¹² See *Rowland v. State*, 35 So. 826, 827 (Miss. 1904); *State v. Thornton*, 730 S.W.2d 309, 318 (Tenn. 1987); JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 27–30 (1992); Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HISTORY 310, 312 (1963); Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1684 n.30 (1986) ("The earliest manslaughter law developed to mitigate punishment when a killing resulted from a 'chance medley' (sudden brawl) common during the sixteenth and seventeenth centuries.").

¹¹³ LAFAVE & SCOTT, *supra* note 1, § 5.7(f).

¹¹⁴ *Regina v. Mawgridge*, 84 Eng. Rep. 1107, 1115 n.1 (1707). For the history of the adultery pigeonhole's roots in archaic notions of property and male prerogatives, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 221–22 (1993). Until the twentieth century, "only husbands could invoke the defense of provocation when they killed after witnessing adultery." Taylor, *supra* note 112, at 1694.

¹¹⁵ See, e.g., Ashworth, *supra* note 6, at 307–08; Dressler, *supra* note 49, at 438–41.

¹¹⁶ Ashworth, *supra* note 6, at 294.

¹¹⁷ RICHARD A. POSNER, SEX AND REASON 260–61 (1992).

¹¹⁸ See *infra* notes 160–68 and accompanying text.

strong retributivist argument remains for continuing to treat the discovery of spousal infidelity as adequate provocation, at least not in every case.

Consider *Schnopps*. Schnopps's wife became involved with another man, declared that she no longer loved Schnopps, announced her intention to divorce him, and moved out of the home.¹¹⁹ Despite the passage of several weeks, during which Schnopps discussed divorce with his own attorney, Schnopps had difficulty respecting his wife's right to divorce him and to choose another intimate partner.¹²⁰ By killing his wife, Schnopps also violated his obligations to his children by permanently depriving them of their mother, with whom they had been living since the parties' separation.

In these circumstances, it seems impossible to defend the conclusion that the moral wrongfulness of Schnopps' act and the punishment he deserves as a matter of justice is among those of the least serious intentional killings. It is not at all clear that Schnopps's wife committed any wrong against him, much less a serious one. Such a conclusion presupposes that, contrary to existing practice, adultery is a serious legal wrong and that a married person who has moved into a separate household and is filing for divorce retains an undiminished obligation of marital fidelity until the divorce becomes final. Even if one indulges these questionable assumptions and concludes that the victim violated serious family obligations, a retributivist also would want to take account of the obligations Schnopps had violated. By killing his wife, he deprived his children of their mother. In fact, given the term of imprisonment he would have to serve, he deprived them of having any custodial parent during most, if not all, of their childhood. In addition, if Schnopps was upset because his wife was ending the relationship and not just because she pursued another intimate relationship without waiting until the divorce became final, he refused to respect her moral and legal right to end the relationship. The moral calculus of retributivism cannot justify putting the *Schnopps* killing into the least serious offense category.

Utilitarian considerations are no more capable than retributive ones of justifying the traditional treatment of adultery. Given that adultery is not an uncommon phenomenon,¹²¹ someone who tends to react to adultery with lethal violence might well pose future dangers and need incapacitation.¹²² The incidence of adultery also strengthens the need for general deterrence. Of course, in cases of heat of passion the

¹¹⁹ Commonwealth v. Schnopps, 417 N.E. 2d 1213, 1215 (Mass. 1981).

¹²⁰ *Id.*

¹²¹ See TOM W. SMITH, NAT'L OPINION RES. CENTER, AMERICAN SEXUAL BEHAVIOR: TRENDS, SOCIO-DEMOGRAPHIC DIFFERENCES, AND RISK BEHAVIOR 7 (1996), available at <http://purl.oclc.org/norc/dlib/sex.pdf> (finding that 15–17% of married persons have had an extra-marital affair); George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 274 tbl.2 (1982) (noting that approximately 60% of men who kill their wives allege that she was sexually unfaithful).

¹²² See *infra* notes 162–64 and accompanying text.

killer does not rationally weigh costs and benefits beforehand so that an increased penalty can change the deliberative outcome. But to the extent the law communicates messages that exert a subconscious tug,¹²³ the adultery pigeonhole communicates precisely the wrong message and “removes an important incentive for persons—primarily men—to learn self-control.”¹²⁴ Thus, the common law adultery rule cannot be explained persuasively on the basis of a reduced need for either incapacitation or deterrence.

Finally, treating the discovery of adultery as a mitigating factor sufficient to reduce murder to manslaughter raises problems of gender equity that both a retributivist and a utilitarian must take seriously.¹²⁵ At early common law, the adultery pigeonhole apparently was invoked exclusively by men and until the twentieth century it was unclear whether women could claim its benefit.¹²⁶ Although now framed in gender neutral terms, the adultery defense still is invoked almost exclusively by men who have killed their wives.¹²⁷ The inequity is exacerbated by the great difficulty that battered women who kill abusive husbands have in convincing courts to instruct juries on self-defense and/or manslaughter.¹²⁸ In many jurisdictions,

¹²³ See *infra* note 165 and accompanying text.

¹²⁴ Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 736 (1995).

¹²⁵ Numerous commentators have sharply criticized the rules that define manslaughter for gender bias. See HORDER, *supra* note 112, at 192–94; Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 78 (1992); Dressler, *supra* note 124, at 735–36; Deborah E. Milgate, Note, *The Flame Flickers, but Burns On: Modern Judicial Application of the Ancient Heat of Passion Defense*, 51 RUTGERS L. REV. 193, 194–95 (1998); Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU. L. REV. 1507, 1546–48 (1996); Taylor, *supra* note 112, at 1689–92.

¹²⁶ See KAPLAN, ET AL., *supra* note 2, at 392; Taylor, *supra* note 112, at 1694.

¹²⁷ HORDER, *supra* note 112, at 186–87; see also Taylor, *supra* note 112, at 1697 (“Cases and social studies show that women rarely react to their husband’s infidelity with deadly violence.” (citations omitted)).

¹²⁸ HORDER, *supra* note 112, at 188–90; Milgate, *supra* note 125, at 194–95; Taylor, *supra* note 112, at 1697–1720.

In some cases, such as those in which an abuser is killed while sleeping, battered women have difficulty invoking the defense of self-defense because when she killed, the threatened harm arguably was not “imminent.” See *State v. Stewart*, 763 P.2d 572 (Kan. 1988) (holding that harm was not imminent as a matter of law when abused woman killed her sleeping husband); *State v. Norman*, 378 S.E.2d 8 (N.C. 1989) (same).

Heat-of-passion voluntary manslaughter can be problematic in such cases for much the same reason. The time between the provocation and killing must not be such that either the killer’s passion has cooled or that a reasonable person in the circumstances would have had time for her passion to cool. Unless threatened with immediate harm, battered women might be deemed to have

then, the law treats as a mitigating circumstance the victim's adultery, which the law no longer punishes, but not prolonged physical or sexual abuse of the killer by the victim, which often amount to serious felonies. Even if this disparate treatment of adultery and abuse does not have gender discrimination as its purpose, it does unjustifiably impose a disproportionate burden on women.

Even though the justifications for the common law adultery pigeonhole have grown weaker, the modern trend anomalously has been in the direction of expanding the pigeonhole.¹²⁹ A number of jurisdictions have relaxed the common law rule that the killer actually witness his spouse in the act of infidelity.¹³⁰ As in *Schnopps*, these jurisdictions treat the killer's being told of the infidelity as sufficient. The Model Penal Code's version of manslaughter¹³¹ likewise does not require "ocular evidence of actual adultery"¹³² and broadens the adultery pigeonhole still further. Unlike the common law, the Model Penal Code requires neither a marital relationship nor a significant lapse of time between the adultery's discovery and the killing. It permits a jury to find a "reasonable excuse or explanation" even when a few days prior to the killing the killer began to suspect that a former girlfriend had been unfaithful.¹³³

In fact, the Model Penal Code does not even require sexual infidelity. One court, for instance, instructed the jury on manslaughter based on the defendant's having

cooled or to have had a reasonable time in which to cool. *See* Nourse, *supra* note 54, at 1367 n.226 (citing cases). In addition, some women "appear to have acted in the face of recent provocation, but with more or less deliberation at or close to the moment of fact" and thus cannot qualify for heat-of-passion manslaughter because they were not in the throes of passion when they killed. *HORDER*, *supra* note 112, at 188, 190 n.25; *Milgate*, *supra* note 125, at 213-18.

There is an extensive literature on whether and to what extent abused spouses can and should be able to invoke the doctrines of self-defense or heat-of-passion and on the admissibility of evidence of the so-called "battered woman syndrome." *See, e.g.,* CYNTHIA GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* (1989); Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 *LAW & HUM. BEHAV.* 579 (1990); Taylor, *supra* note 112, at 1704-35; Robert F. Schopp et al., *Battered Women Syndrome Expert Testimony, and the Distinction Between Justification and Excuse*, *U. ILL. L. REV.* 45 (1994).

¹²⁹ *But see* MD. CODE ANN. art. 27 § 387A (Supp. 1998) (abolishing the adultery pigeonhole).

¹³⁰ *See* *State v. Auchenbach*, 540 N.W.2d 808, 815-16 (Minn. 1995) (instructing the jury on manslaughter in a case where defendant learned that his former girlfriend had been seeing other men); *LAFAVE & SCOTT*, *supra* note 1, § 7.10(b)(5), at 656-57. *But see* *State v. Shane*, 590 N.E.2d 272, 278 (Ohio 1992) (refusing to expand adultery pigeonhole).

¹³¹ MODEL PENAL CODE § 210.3 (1980).

¹³² *State v. Saxon*, 86 A. 590, 594 (Conn. 1913).

¹³³ *See* Nourse, *supra* note 54, at 1362-66; *cf. People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980) (holding that the defendant was entitled to manslaughter instruction when he claimed he was upset because the victim, whom he had casually dated a few times, told him she was not falling in love with him).

seen his former girlfriend dancing with another man two weeks before he killed her.¹³⁴ Another court instructed the jury on manslaughter based on the defendant's testimony that he had observed his wife taking phone calls from an ex-boyfriend.¹³⁵ In yet another case that reached the jury, the "reasonable explanation or excuse" consisted of the defendant's having seen his wife in the presence of another man.¹³⁶ Such cases, which demonstrate how greatly the Model Penal Code broadens the common law's adultery pigeonhole, cannot be defended on either retributive or utilitarian grounds.

2. Underinclusivity

In addition to reducing murder to manslaughter based on circumstances whose mitigating nature is dubious at best, existing law overlooks circumstances of an unquestionably mitigating nature.

Dudley & Stephens, the famous life-boat case whose facts are summarized above,¹³⁷ provides an excellent example. Numerous mitigating circumstances accompanied the killing. First, in contrast with the brutal slaying of the ten-year-old victim in *Anderson*, Dudley and Stephens were not insensitive to their victim's interests. They did not want to kill the boy unless absolutely necessary to the survival of the other three in the lifeboat, and thus they waited until the boy himself was near death. Second, as in *Forest*, their premeditation had a mitigating rather than an aggravating significance. They discussed the killing and, due to moral qualms about it, waited until they reasonably thought there were no alternatives.¹³⁸ Third, there were extreme and highly unusual circumstances, with the men having been on the high seas in a small boat for nearly three weeks, near starvation, and understandably fearful of losing their lives.

Finally, as the jury found, they reasonably believed that unless they killed the youngest crew member they had no appreciable chance of surviving until their rescue. In other words, they reasonably believed that they were saving three lives instead of letting all four crewmen die. The defendants' reasonable belief that they needed to kill

¹³⁴ *State v. Martinez*, 591 A.2d 155 (Conn. App. Ct. 1991).

¹³⁵ *People v. Aphaylath*, 499 N.Y.S.2d 823, 824 (N.Y. App. Div.), *rev'd on other grounds*, 502 N.E.2d 998 (N.Y. 1986).

¹³⁶ *State v. Ott*, 686 P.2d 1001, 1004 (Or. 1984).

¹³⁷ See *supra* note 104–09 and accompanying text. The case is reprinted in many criminal law texts. See, e.g., KAPLAN ET AL., *supra* note 2, at 637; LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* 248, 361 (6th ed. 1998).

¹³⁸ Like *Forest*, *Dudley & Stephens* is a case in which premeditation has mitigating rather than aggravating significance. Dudley's and Stephens's reflections on whether to kill indicated moral anguish, not Machiavellian planning and insensitivity to the victim's interests. See *supra* text between notes 95 and 96.

one person, who was bound to die soon anyway, to save the lives of three other persons arguably excuses or even justifies the killing, thereby absolving them of any homicide liability.¹³⁹ Even if one assumes that the British Law Lords in *Dudley & Stephens* were right to reject a defense of necessity for homicide, such necessity nonetheless mitigates the wrongfulness of the killing.

Together, these mitigating circumstances easily merit placing the killing in the least serious group of intentional homicides. The jury, which took the highly unusual step of deferring the question of guilt or innocence to the court, apparently thought so. So did the Crown, which commuted Dudley's and Stephens's death sentences to the six months they had already served.¹⁴⁰

Both retributivist and utilitarian considerations reinforce the conclusion that the *Dudley & Stephens* killing belongs in the least serious offense category. Rather than offending the respect for individual autonomy that underlies retributivism, the killing at least arguably was required by it. The infringement upon the victim's autonomy was mitigated by the reality that he would have soon died of starvation anyway. More important, if Dudley and Stephens had not killed the boy, then the three others in the lifeboat also would have died and have had their autonomy extinguished altogether. Dudley and Stephens had a choice between extinguishing the autonomy of one person who would have died soon anyway or extinguishing the autonomy of all four crewmen. Respect for individual autonomy would seem to dictate the latter choice.¹⁴¹ Of course, Kant, history's most influential retributivist, believed that it was wrong to treat one person as a means to another's ends¹⁴² and the killing in *Dudley & Stephens* might be deemed wrongful for that reason. Even so, judged in terms of its disrespect for individual autonomy, it still belongs among the least serious intentional homicides.

Utilitarian considerations yield the same conclusion. Judged in isolation, the killing itself would seem to be justifiable on utilitarian grounds given that it resulted in a net savings of lives.¹⁴³ A utilitarian nonetheless might resist absolving Dudley and Stephens of criminal liability altogether because to do so would entail recognition of a necessity defense that in other cases might be misapplied or encourage

¹³⁹ See *United States v. Holmes*, 26 F. Cas. 360, 366-67 (C.C.E.D. Pa. 1842) (No. 15,383) (recognizing in dicta that necessity may be a defense to homicide in limited circumstances); MODEL PENAL CODE § 3.02 cmt. 3, 14-17 (1980) (accepting necessity defense to homicide); Wechsler & Michael, *supra* note 3, at 738-39.

¹⁴⁰ KADISH & SCHULHOFER, *supra* note 55, at 136 n.2.

¹⁴¹ See MODEL PENAL CODE § 3.02 cmt. 3, at 14 (1980) ("conduct that results in taking life may promote the very value sought to be protected by the law of homicide").

¹⁴² IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (J. Ladd trans. 1965).

¹⁴³ See MODEL PENAL CODE § 3.02 cmt. 1, at 9-10 (1980). See generally Philippa Foot, *Utilitarianism and the Virtues*, 94 MIND 196 (1985).

unwarranted killings.¹⁴⁴ Yet even if such slippery slope concerns justifying treating the *Dudley & Stephens* killing as criminal homicide, the killing belongs in the least serious group of intentional homicides. The extreme and unusual circumstances of the case make it implausible to argue that Dudley and Stephens required severe punishment to incapacitate or rehabilitate them or to deter others similarly situated in the future.

Notwithstanding the mitigating circumstances and potent arguments for placing the *Dudley & Stephens* killing in the least serious offense category, it could not be classified as manslaughter under existing law. Dudley and Stephens were not in the throes of passion when they killed, as required by the common law version of manslaughter. In addition, the necessity for the killing fits into none of the common law pigeonholes of provocations deemed adequate to reduce a killing from murder to manslaughter.¹⁴⁵ The arguable necessity could qualify as a "reasonable excuse or explanation" under the Model Penal Code formulation. However, Dudley and Stephens probably were not laboring under any "extreme mental or emotional disturbance" when they decided to kill. Like the common law, the Model Penal Code provision on manslaughter has impulsive killings in mind and Dudley and Stephens premeditated the boy's killing.

The *Forest* case discussed in Part II, which involved the defendant's premeditated "mercy killing" of his dying father, is yet another case involving powerful mitigating circumstances that the law of manslaughter, at least in its common law version, overlooks. Forest evidently believed that his father's prognosis was hopeless and his death imminent, and that he was acting in his father's best interests. He was quite upset with what he understandably perceived as his father's loss of dignity and felt tremendous remorse and sorrow after the killing. Judged in light of either the lack of respect for individual autonomy or the needs for incapacitation or deterrence, these mitigating circumstances place the killing among the least culpable and heinous intentional killings. Under the common law, however, the killing is not a candidate for manslaughter because there was no provocation fitting into one of the predetermined common law pigeonholes. Whether the killing may qualify as manslaughter under the Model Penal Code depends on whether Forest was suffering from "an extreme emotional or mental disturbance."¹⁴⁶

In identifying circumstances that may mitigate murder to manslaughter, then, existing law is both overinclusive and underinclusive. As in *Schnopps*, it takes notice

¹⁴⁴ Such slippery slope concerns were central to Lord Coleridge's opinion rejecting a necessity defense in *Dudley & Stephens*, 14 Q.B.D. 273, 281–88 (1884).

¹⁴⁵ See *supra* Part I.B.

¹⁴⁶ MODEL PENAL CODE § 210.3(1)(b) (1980). If so, a jury would be permitted to find that the various mitigating factors surrounding the killing constituted "a reasonable explanation or excuse." If Forest was not in the throes of emotion when he killed his father then the outcome is different. Like the common law, the Model Penal Code would treat as irrelevant the other mitigating circumstances still present.

of circumstances whose mitigating force is weak or nonexistent while, as in *Dudley & Stephens* and *Forest*, overlooking circumstances of an undeniably mitigating nature.

B. *Aggravation and Familial Duties*

Consider the facts of *Brooks v. State*:¹⁴⁷

Approximately one month prior to her death, the victim filed for divorce. The defendant subsequently moved into a trailer about a block from the victim's house. . . . [O]n numerous occasions the defendant publicly pled with the victim to reconcile with him which the victim adamantly refused to do. One witness testified the defendant vowed "he would see [the victim] dead before he'd let her get a divorce." . . . [O]n the day of the victim's death, . . . the defendant telephoned the victim's house, . . . [and] the victim refused to speak to him [saying that] she did not have time to talk to him because "she was going on a hot date." [The defendant then walked to the victim's house and after she walked out of the house he began shooting her.]

[T]he defendant then nudged the victim's body with his foot and stated, "You whore, you won't whore no more." The victim's fourteen-year-old daughter testified that she watched from several feet away while the defendant approached the victim and opened fire on her. The victim's daughter testified that neither the defendant nor the victim spoke before the defendant shot.

Brooks illustrates yet another basic deficiency in the law of manslaughter—searching only for mitigation, it overlooks the contemporaneous presence of aggravating circumstances. Intimate relationships and family life are very frequently the stuff of manslaughter cases. While such relationships undoubtedly can and do give rise to very powerful and understandable emotions, they also give rise to some serious familial obligations. Without good justification, the law of manslaughter focuses on the understandable emotions and ignores the breach of familial obligations. Contrary to both the traditional paradigm and existing versions of the new paradigm,¹⁴⁸ this section argues for treating the killer's breach of such obligations as an aggravating factor in some circumstances.

¹⁴⁷ 292 S.E.2d 694 (Ga. 1982).

¹⁴⁸ Aggravating factors that do not focus on family obligations may apply in an intra-familial setting. For instance, an intra-familial killing may be premeditated. However, there is only one commonly recognized circumstance relevant to the grade of the offense that focuses specifically on familial obligations: the common-law rule that a heat-of-passion killing upon the discovery of adultery mitigates an intentional killing from murder to manslaughter. *See supra* notes 114, 130–36 and accompanying text.

In response to recent attention to domestic violence, a growing trend has developed in favor of creating separate and more serious offenses for nonlethal assaults against family members. *See, e.g.*, 2000 AL. ACTS 266 (2000); ARK. CODE ANN. §§ 5-4-601 to -618 (Michie 1997 & Supp.

Applying an expanded version of the common law's adultery pigeonhole, the Georgia Supreme Court in *Brooks* held that the jury should have been instructed on heat-of-passion voluntary manslaughter. This result, and the law of manslaughter it reflects, are hard to defend. Even if one grants that Brooks's wife's confessed infidelity by itself should be treated as sufficient to mitigate murder to manslaughter, which is especially questionable given that she had already filed for divorce and was living elsewhere,¹⁴⁹ several powerful aggravating factors were also present.

The first and most obvious aggravating circumstance is that Brooks brutally killed his wife while their fourteen-year-old daughter watched. In other contexts, the law recognizes and enforces parental obligations to care for the well-being of children.¹⁵⁰ In knowingly exposing his daughter to the horror of witnessing her mother's killing, Brooks was outrageously insensitive to his daughter's well-being.

1999); 720 ILL. COMP. STAT. ANN. § 5/12-3.2 (West 1993 & Supp. 2000). So far, however, this trend anomalously has had little impact on the law of homicide.

Only a handful of jurisdictions treat violation of familial obligations as an aggravating circumstance relevant to the grade of homicide offenses. Minnesota's recent domestic abuse statute makes it first-degree murder to kill a family or household member while committing domestic abuse "when the perpetrator has engaged in a past pattern of domestic abuse upon the victim and the death occurs in circumstances manifesting an extreme indifference to human life." MINN. STAT. ANN. § 609.185 (West Supp. 2000). Minnesota and a few other states have similar statutes that apply when the victim was a child who had been previously abused by the defendant. See Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1290-91 (1994); cf. COLO. REV. STAT. § 18-2-102(1)(f) (1999) (murder is first-degree murder when the victim is under twelve and the killer occupied a position of trust).

The federal sentencing guidelines provide that "[f]amily ties . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2000).

¹⁴⁹ Adultery generally should not be treated as a mitigating circumstance sufficient to reduce the grade of the offense. See *supra* notes 114-36 and accompanying text. The case for treating infidelity as such a mitigator in *Brooks* is especially unconvincing for the reasons mentioned in the text.

¹⁵⁰ See, e.g., GA. CODE ANN. § 19-7-2 (1999) (providing that a parent has an obligation to provide for the maintenance, protection, and education of his or her child); LAFAVE & SCOTT, *supra* note 1, § 3.3(a)(1) at 203; 59 AM. JUR. 2D PARENT & CHILD § 14 (1996); Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. LEGIS. 397, 407 (1999).

In legal terms, Brooks' act amounted to criminal child abuse¹⁵¹ as well as the tort of the intentional or reckless infliction of emotional distress.¹⁵²

Second, in addition to forcing his minor daughter to watch the killing, Brooks permanently deprived her of the parent with whom she had been living. This, too, was greatly insensitive to his child's interests. In divorce cases, each parent generally has a legally enforceable obligation to allow the child reasonable access to the other parent.¹⁵³ The obligation exists not only to protect the interests of each parent, but also to promote the child's welfare. While even temporary breaches of this obligation constitute a legal wrong,¹⁵⁴ the law of homicide anomalously treats the permanent breach that results from the killing of the other parent as irrelevant to the grade of the offense.

Finally, the defendant failed to accord due respect to his wife's legal right to divorce. His wife was living in a separate household and had filed for divorce. She had persistently refused the defendant's repeated entreaties for reconciliation. Divorce laws, and the liberalizing reforms of them, are premised on the notion that individuals have a right to change partners. The same respect for individual autonomy that undergirds the right to divorce also underlies retributivism, which derives its inspiration from Kantian moral philosophy. On a retributive view, then, a defendant who kills his victim because she has exercised her right to end one intimate relationship and begin another has committed a serious moral and legal wrong. The wrongfulness of the killing in *Brooks* was aggravated by the fact that it was motivated at least in part by the victim's filing for divorce and refusing to reconcile with the defendant.

In reversing Brooks's murder conviction and holding that the killing was an appropriate candidate for manslaughter, the Georgia Supreme Court overlooked three aggravating factors: the defendant's abuse of his daughter in having her watch the killing, the abuse of his daughter in forever depriving her of her mother, and the defendant's failure to respect his wife's legal right to divorce him.

Unfortunately, *Brooks* is not an aberration. Numerous other reported cases reflect judicial determinations that a killing qualifies for manslaughter even though the

¹⁵¹ See GA. CODE ANN. § 16-5-70 (1999) (cruelty to children in the first-degree consists of a parent maliciously causing a minor child excessive mental pain; second-degree consists of a parent's intentionally allowing a child to witness intra-family battery).

¹⁵² See *Yarbray v. S. Bell Tel. & Tel. Co.*, 409 S.E.2d 835 (Ga. 1991) (setting forth elements of intentional infliction of emotional distress, which include extreme and outrageous conduct and severe emotional distress).

¹⁵³ Cf. GA. CODE ANN. § 19-9-3(d) (1999) ("It is the express policy of this state to encourage that a minor child has continuing contact with parents . . . and to encourage parents to share in the rights and responsibilities of raising their children after such parents have separated or dissolved their marriage.").

¹⁵⁴ See GA. CODE ANN. § 16-5-45 (1999) (making it a criminal offense to interfere with custody rights).

defendant killed the mother of his children and/or failed to respect his wife's decision to separate and divorce him.¹⁵⁵ Such cases appear to arise with greater frequency in Model Penal Code jurisdictions,¹⁵⁶ which is not surprising given the Code's broadened version of manslaughter.

In her comprehensive study, Professor Nourse found that courts applying provisions modeled on the Model Penal Code have frequently instructed juries on manslaughter when the "reasonable explanation or excuse" consisted of the victim's having exercised her legitimate right to divorce or separate from her spouse or former lover.¹⁵⁷ Focusing on jurisdictions that follow the Model Penal Code's manslaughter provisions, Professor Nourse identified all reported cases from the 1980–1995 period "in which a provocation claim was asserted in the context of an adult intimate relationship."¹⁵⁸ In approximately twenty percent of the cases she identified (26 of 133), courts instructed juries on manslaughter when a principal excuse or explanation

¹⁵⁵ See, e.g., *People v. Spurlin*, 202 Cal. Rptr. 663 (Cal. Ct. App. 1984) (reporting that defendant killed the mother of his two children); *Strickland v. State*, 357 S.E.2d 85 (Ga. 1987) (reporting that defendant and his wife entered into a separation agreement and that when she refused to reconcile, citing sexual involvement with others, defendant killed her); *Raines v. State*, 277 S.E.2d 47 (Ga. 1981) (allowing manslaughter instruction where defendant killed the mother of his three children); *Commonwealth v. Schnopps*, 417 N.E.2d 1213 (Mass. 1981) (reversing trial court's refusal to instruct jury on voluntary manslaughter where defendant killed his wife, with whom he had children, after she had moved out and had told him she wanted a divorce); *State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995) (affirming trial court's jury instruction on manslaughter when defendant killed former girlfriend, the mother of his daughter); *State v. Ott*, 686 P.2d 1001 (Or. 1984) (affirming trial court's jury instruction on manslaughter where defendant killed estranged wife and mother of his child); cf. *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980) (holding defendant entitled to have trier of fact consider manslaughter verdict where defendant was upset over victim whom he had casually dated telling him she was not falling in love with him).

In 1998, there were 1,830 cases of intentional killings of intimate partners. Three out of four of the victims were women, and approximately thirty percent of all female victims of intentional homicides were killed by an intimate partner. By contrast, approximately four percent of all male victims of intentional homicides were killed by an intimate partner. CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE (2000).

¹⁵⁶ See, e.g., *State v. Martinez*, 591 A.2d 155 (Conn. App. Ct. 1991) (reporting, without addressing the merits of the issue, that trial court instructed jury on manslaughter based on defendant's emotional upset over having witnessed his former girlfriend dance with another man two weeks prior to the killing); *State v. Hull*, 556 A.2d 154, 157 (Conn. 1989) (indicating, without addressing the merits of the issue, that trial court had instructed jury on manslaughter based on defendant's upset over rumors of infidelity on the part of his wife, who had moved out, filed for divorce, and had obtained a restraining order against defendant).

¹⁵⁷ Professor Nourse observes that the Model Penal Code "has permitted juries to return a manslaughter verdict in cases where the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order." Nourse, *supra* note 54, at 1332 (footnotes omitted).

¹⁵⁸ *Id.* at 1345.

for the defendant's emotional state was that the victim sought to leave a relationship that "was over, ending, or about to end."¹⁵⁹

The animating purposes of criminal punishment reinforce the intuitive conclusion that the law ought to take into account a defendant's violation of familial obligations in such cases. Existing law allows the *victim's* breach of a serious legal obligation owed to the defendant to mitigate the grade of the offense.¹⁶⁰ This same retributivist logic implies that the *killer's* breach of serious obligations to his victim or his children also ought to influence the grade of the offense.¹⁶¹ When, as in *Brooks*, the defendant forces his child to witness the killing and/or permanently deprives the child of one parent, he violates serious moral and legal obligations to his children. The killing is more wrongful for that. A killing is also more wrongful when, also as in *Brooks*, he kills in response to the victim's exercise of her legal right of autonomy to end their relationship, file for divorce, and commence other intimate relationships. In such cases, the retributivist insistence on just deserts demands that the killer's breach of familial obligations be taken into account in classifying the severity of the offense and selecting an appropriate level of punishment.

A utilitarian view of the purposes of criminal punishment would also generally treat violations of the familial obligations discussed above as aggravating in nature. Those who defend reducing the punishment for heat-of-passion killings often do so on the ground that the interest in specific deterrence applies weakly, if at all, to such killings.¹⁶² According to this argument, the defendant is quite unlikely to kill in the future because he was subject to unusual pressures that probably will not recur.

¹⁵⁹ *Id.* at 1352, 1356; see also JOHN M. DAWSON & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MURDER IN FAMILIES 7 tbl.12 (1994) (finding that of those convicted of intentional homicide in large urban counties in 1988, approximately 58% who killed nonfamily members were convicted of murder as opposed to manslaughter while 48% who killed family members were convicted of murder).

¹⁶⁰ See *supra* notes 53, 115 and accompanying text.

¹⁶¹ See Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 532 (1987).

Extreme and repetitive child abuse may call for more severe sanctions than assault by strangers. Certainly the "family context," which is the defining aspect of parental incest, justifies more serious sanctions for the same reasons that embezzlement can be a more severely punished property crime: the penal wrong is exacerbated by abuse of trust.

Id. at 533.

¹⁶² See *State v. Krieger*, 731 P.2d 592, 594 (Alaska Ct. App. 1987) (trial court had concluded that deterrence of the defendant would not be served by further imprisonment where defendant had killed wife's lover); Nourse, *supra* note 54, at 1373-74; Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 470 n.18 (1988); Jack K. Weber, *Some Provoking Aspects of Voluntary Manslaughter Law*, 10 ANGLO-AM. L. REV. 159, 171 (1981); Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1037-38 (1958).

Whatever its force in other contexts, this justification is unpersuasive in the context of domestic violence. Domestic violence involves on-going relationships. Given that most persons have intimate and family relationships throughout the course of their adult lives, the pressures that arise from divorce, separation, infidelity, and the like carry considerable likelihood of repeating themselves within an individual's life. The available evidence indicates that domestic violence is characterized by relatively high rates of recidivism.¹⁶³ The utilitarian interests in specific deterrence and incapacitation, it seems, should carry significant weight.¹⁶⁴

Furthermore, general deterrence also argues for increasing, not decreasing, the punishment for those who kill in violation of family obligations. Given the impulsivity of many such killings, increased punishment probably does not enter into the explicit cost-benefit calculations of potential offenders and therefore cannot really deter. Even so, enhanced punishment has an educative function, which ultimately has a deterrent effect. The punishment of any given defendant sends a message to others similarly situated. Through media accounts and from acquaintances, potential offenders become aware of the degree of punishment meted out in certain kinds of cases. Over time, the repeated communication of these punishments influences a potential offender's perception of the value that society, and very possibly the offender, places on certain kinds of wrongs. These internalized values affect conduct, not so much because they are explicitly called to mind, but rather because, through implicit perceptions of wrongfulness and permissibility, they exert a subconscious tug.¹⁶⁵

¹⁶³ See *People v. Stanley*, 897 P.2d 481 (Cal. 1995) (reporting that defendant killed his fourth wife after his third wife mysteriously disappeared, he was on parole for murdering his second wife, and he had threatened to kill his first wife); *Garcia v. Superior Court*, 789 P.2d 960 (Cal. 1990) (reporting that when paroled from killing his first wife, defendant killed his girlfriend); Coker, *supra* note 125, at 112 ("men who are abusive in one relationship are likely to abuse again in the next relationship"); Nourse, *supra* note 54, at 1373-74; Rapaport, *supra* note 125, at 1533; Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 824 (2000); cf. PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES 21 tbl.35 (1995) (reporting that 70% of husbands who kill their wives had a prior arrest or conviction).

¹⁶⁴ Cf. Amy Thistlethwaite et al., *Severity of Dispositions and Domestic Violence Recidivism*, 44 CRIME & DELINQ. 388, 396 (1998) (finding that more severe sentences that included jail plus probation lowered recidivism, especially in cases involving perpetrators with a stake in conformity).

¹⁶⁵ On the "educative" impact of criminal punishments, see, e.g., JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 494-96 (1985); FRANKLIN E. ZIMRING, *PERSPECTIVES ON DETERRENCE* 4-5 (1971); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 750-51 n.84 (1998) (citing sources); Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 176, 179-80 (1952).

In this way, treating a family relationship as an aggravating circumstance holds some promise of deterring intra-familial violence. By allowing passion to mitigate murder to manslaughter when the killer has violated intra-familial obligations, existing law implicitly sends the message that the breach of such obligations does not matter. Worse, given that the passions that mitigate murder to manslaughter frequently arise in domestic situations, existing law can be seen to imply that intra-familial violence is not as wrongful as violence in other contexts. Treating a family relationship as an aggravating circumstance would have the salutary effect of communicating the opposite message that one owes higher obligations to family members and that the breach of familial obligations makes a killing more wrongful. The need to send such a message is amplified by the number of persons who can be expected to experience emotional stress from family life and "the tendency of family violence to represent a continuing threat."¹⁶⁶ It is also amplified by the higher obligation that most utilitarians would say a person owes to family members than to strangers.¹⁶⁷ In light of all of these considerations, one may reasonably suppose that treating a family relationship as an aggravating circumstance relevant to the grade of the offense would deter some intra-familial violence.¹⁶⁸

¹⁶⁶ Zimring, *supra* note 161, at 533; *cf.* Nathan, *supra* note 163, at 824 ("Of all the women murdered in the United States in a given year, approximately thirty percent lose their lives to husbands or boyfriends."); RONET BACHMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 1 (1994) (stating that between 1973 and 1991 the violent crime rate for women has remained stable while this same rate has declined for men).

¹⁶⁷ See Dan W. Brock, *Utilitarianism and Aiding Others*, in THE LIMITS OF UTILITARIANISM 225, 227 (H.B. Miller & W.H. Williams eds., 1982).

¹⁶⁸ See *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1522–24 (1993) (arguing that the deterrent impact of recent harsh treatment of drunk driving argues for similar treatment of domestic violence).

The argument, of course, presumes that increased punishment will have a deterrent effect. Although policymakers certainly presume that increased punishment generally deters crime, it is notoriously difficult as an empirical matter to determine whether and to what extent this is so. The available general evidence on the deterrent impact of increased punishment appears inconclusive. Compare WILSON & HERRNSTEIN, *supra* note 165, at 393–96 (concluding that increased punishment deters), with MICHAEL TONRY, SENTENCING MATTERS 137 (1996) (stating that the consensus among governmental advisory boards in various countries is that increased penalties probably do not significantly reduce the incidence of crime). See DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Alfred Blumstein et al. eds., 1978) (containing a report issued by a panel of experts on the subject as well as several commissioned papers reviewing and interpreting existing literature on deterrence and incapacitation).

The available evidence in the context of domestic violence is conflicting and of very little relevance here because it focuses mostly on the effect of arrests for nonlethal incidents of domestic violence and does not consider at all the deterrent and incapacitative effects of sentence severity for homicide offenses. See JEFFREY FAGAN, U.S. DEP'T OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS (1996) (discussing possible legal reform to inhibit

Violation of familial obligations such as the ones discussed above, although perhaps the most conspicuous example, is not the only aggravating factor that the law of manslaughter now ignores. Aggravating factors, such as the cruel infliction of extreme suffering or the youth or vulnerability of the victim, often coexist with circumstances that the law now treats as sufficient to reduce murder to manslaughter. *Perry v. Commonwealth*¹⁶⁹ provides a particularly egregious example. In *Perry*, the Kentucky Supreme Court declared that an instruction on manslaughter was appropriate even though (i) the victim was a police officer who had served legal papers on the defendant; (ii) Perry fired on the officer five times, with one shot severing the officer's spine; (iii) while the officer was lying paralyzed on the ground, Perry pointed his gun at the officer's head and pulled the trigger (but the gun jammed); and (iv) Perry tried to run over the officer with his car as he left.¹⁷⁰ The jury was asked to decide only whether Perry had suffered from an excused emotional disturbance. The numerous aggravating circumstances played no recognized role in grading the offense, although they probably exerted an illicit subterranean influence on the jury's actual decision. Existing law is structured in a way that takes cognizance of mitigating circumstances but blithely ignores the simultaneous presence of aggravating circumstances.¹⁷¹

C. Conclusion

In both its common law and Model Penal Code incarnations, the law of manslaughter suffers from serious shortcomings. It permits murder to be reduced to

domestic violence, but only in the context of "battering" or assault, not homicide). Good reasons exist for believing that increased sentence severity will have deterrent effects in the context of domestic violence. As Professor Zimring has written, "[t]he potential for high levels of detection, and thus for enhanced deterrence and incapacitation, may distinguish family violence from other crimes and justify more optimism about punitive approaches in family violence prevention." Zimring, *supra* note 161, at 535. See also Daniel D. Polsby, *Suppressing Domestic Violence With Law Reforms*, 83 J. CRIM. L. & CRIMINOLOGY 250, 252 (1992) (hypothesizing that dealing more severely with intrafamilial violence would likely have a general deterrent effect in the long term); cf. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 458-60 (1997) (arguing that the likelihood of escaping apprehension is the primary reason for skepticism about the deterrent impact of increased sentences).

¹⁶⁹ 839 S.W.2d 268 (Ky. 1992).

¹⁷⁰ *Id.* at 269-70.

¹⁷¹ See, e.g., *State v. Whatley*, 1996 Ohio App. LEXIS 1952 (May 14, 1996) (convicting defendant of voluntary manslaughter even though the two victims were children); *Dixon v. State*, 597 S.W.2d 77, 78 (Ark. 1980) (holding that defendant was entitled to instruction on Model Penal Code version of manslaughter even though he viciously beat the victim repeatedly throughout the night despite her entreaties for him to stop); *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980) (holding that defendant was entitled to manslaughter instruction even though he repeatedly stabbed the victim and then drowned her in a bathtub).

manslaughter on the basis of circumstances whose mitigating significance is quite suspect while ignoring circumstances that do carry significant mitigating weight. It also permits murder to be reduced to manslaughter in the face of powerful aggravating circumstances, which frequently involve the commission of very serious wrongs against family members.

The new paradigm provides a better framework for grading. Instead of searching only for excused passion, its structure allows for the recognition of multiple mitigating circumstances. Instead of exclusively focusing on only mitigating circumstances, its structure recognizes that both aggravating and mitigating circumstances can exist alongside one another.

Still, the content of the new paradigm must be modified to remedy existing law's complete failure to regard a breach of familial obligations as an aggravating circumstance. In other contexts, the law recognizes that one owes higher obligations to one's immediate family, especially minor children. When the defendant kills in violation of family obligations—by, for instance, depriving his children of a parent—retributivist and utilitarian justifications jointly support treating the breach as an aggravating circumstance relevant to the grade of the offense.

IV. RECONSTRUCTING HOMICIDE LAW

The traditional paradigm's list of aggravating and mitigating circumstances is both too short and too long. It assigns a homicide to the most serious offense category of first-degree murder based solely on the aggravating circumstances of premeditation and commission of a felony. It thereby overlooks other significant aggravating factors and any mitigating factors that also may be present, including the occasionally mitigating nature of premeditation itself. It also relies on a fundamentally flawed set of considerations in assigning an intentional homicide to the least serious offense category of manslaughter. The traditional paradigm gives effect to circumstances such as the victim's infidelity, whose mitigating force is questionable at best, overlooks other circumstances of an obviously mitigating nature such as necessity, and treats as irrelevant the presence of serious aggravating circumstances, such as the breach of familial obligations that the killer owed to the victim's children. This critique of traditional law supports the new paradigm's general structure, which permits consideration of a greater array of aggravating and mitigating circumstances and allows them to be balanced against one another when they coexist.

Still, important questions remain. The first question concerns the number of offenses that should be used in the grading scheme. On the one end of the spectrum, the law could establish more than the three or four offenses that now exist. On the other end of the spectrum, the law could establish only one offense for intentional homicides, thus leaving it up to the sentencing process to calibrate the importance of any and all aggravating and mitigating circumstances. Of course, creating one catch-all offense would have the effect of removing juries from the grading process. The

proper number of offenses thus implicates a second question, or set of questions, concerning the proper roles of judges, juries, and legislatures in the grading process. Yet a third question, which arises so long as the law continues to recognize more than one offense for intentional homicides, concerns which aggravating and mitigating factors ought to be recognized as relevant to the grade of the offense. The circumstances set forth in death penalty statutes, which are meant to govern the sentencing phase of death penalty cases, should not necessarily govern the classification of intentional homicides generally.

This Part grapples with these questions. It argues that, with some significant modification of its content, the new paradigm's reach should be extended beyond the death penalty sentencing context to the grading of intentional homicides generally. Consistent with existing law, this Part maintains both that the law should recognize several offenses for intentional homicides and that grading should not be left solely to the discretion of judges at sentencing. Instead, the grading process should involve both jurors, who classify intentional homicides into one of several offense categories, and legislatures, which specify the aggravating and mitigating circumstances to guide juror classification decisions.

This Part also proposes a draft statute, which includes a model list of aggravating and mitigating circumstances relevant to the grade of the offense. This list overlaps with, but has some significant differences from, the aggravating and mitigating circumstances that are now generally found in death penalty statutes. Whereas death penalty statutes include circumstances relating to the defendant's prior record, this Part maintains that such circumstances should not influence the grade of the offense, but rather, in the interests of efficiency and fairness, should be left to sentencing. Also, in contrast with death penalty statutes, it proposes treating a breach of serious familial obligations as an aggravating circumstance relevant to the grade of the offense.

A. The General Framework for Reform

Any system for classifying homicides must balance the need to classify homicides accurately, in accordance with the degree of punishment warranted on the facts of the particular case, against the needs for simplicity and efficiency. The interest in accuracy calls for classifying homicides into more, rather than fewer, offenses and for considering more, rather than fewer, aggravating and mitigating circumstances. The interests in simplicity and speed push in the opposite direction, arguing for fewer offenses and for consideration of fewer aggravating and mitigating circumstances.

The traditional paradigm strikes the balance on the side of efficiency and sacrifices accuracy, even more than is necessary, to achieve that level of efficiency. In considering just a few aggravating and mitigating circumstances, and in never permitting aggravating and mitigating circumstances to be weighed against one another, it does have the virtue of relative simplicity. However, it fares very poorly on

the dimension of accuracy. In part, this results from the efficiency of relying on just a few aggravating and mitigating circumstances. As we have seen, however, it is also partly the result of relying on the *wrong* aggravating and mitigating circumstances. Cases such as *Anderson*,¹⁷² *Schnopps*,¹⁷³ and *Brooks*,¹⁷⁴ which unfortunately are not atypical, illustrate the unacceptable degree to which the traditional paradigm compromises accuracy.

1. *The Number of Offenses*

One appealing way to reconcile the competing interests of accuracy and efficiency would be to have one catch-all offense for intentional homicides, thus leaving it up to the sentencing process to calibrate the relative importance of any and all aggravating and mitigating circumstances. This approach would satisfy the interest in efficiency by simplifying the jury's task into one of determining only whether the homicide was intentional. It would also respond to the interest in efficiency by remitting the complex task of determining the existence and relative weight of all relevant aggravating and mitigating circumstances to sentencing. The task is performed more efficiently in this setting because in the overwhelming bulk of jurisdictions, it is accomplished by a judge rather than a multi-member jury, it is done on a more informal record, and it is accomplished through use of a preponderance of the evidence standard. While producing efficiency gains, the one-offense approach simultaneously accommodates the need for accuracy by allowing the sentencing judge to make a fine-grained determination based on a much more numerous set of aggravating and mitigating circumstances.

Despite these attractions, the one-offense approach has the unacceptable consequence of removing juries from the process of grading homicides. Under existing law, jurors participate in the grading process by deciding which of several offenses applies on a given set of facts. Legislatures participate by specifying the aggravating or mitigating circumstances that define those offenses. The one-offense approach, in contrast, leaves it entirely to judges to decide, based on the facts of the case, which aggravating and mitigating circumstances exist, their relative weight, and the appropriate range of punishment.

In removing the jury from the grading process, the one-offense approach raises serious constitutional doubts. In a line of cases beginning in the 1970s,¹⁷⁵ the Court has indicated that the Constitution imposes some limits on the extent to which facts

¹⁷² See *supra* notes 62–74 and accompanying text.

¹⁷³ See *supra* notes 103, 118–21 and accompanying text.

¹⁷⁴ See *supra* notes 147–54 and accompanying text.

¹⁷⁵ *Jones v. U.S.*, 526 U.S. 227 (1999); *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

relevant to the severity of punishment may be determined by a judge at sentencing. One issue concerns the import of the Sixth Amendment right to a trial by jury on the allocation of fact-finding between judge and jury.¹⁷⁶ A related but conceptually distinct issue concerns those surrounding circumstances that must be treated as an element of the offense, subject to the due process requirement of proof beyond a reasonable doubt.¹⁷⁷ This past term, in *Apprendi v. New Jersey*, the Court held that “any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”¹⁷⁸

The one-offense approach would not violate a strict construction of the principle the *Apprendi* majority identified. Taken literally, that principle is violated only when a judge determines the existence of a fact that increases the applicable sentencing range. Under the one-offense approach, in contrast, the existence of any given mitigating or aggravating circumstance would not alter the sentencing range itself; instead, it would only influence the defendant’s placement *within* an exceedingly broad range.

Still, *Apprendi* casts serious doubt on the constitutionality of the one-offense approach. It is quite doubtful that the Court would permit legislatures to evade the *Apprendi* principle through the stratagem of lumping separate offenses, each of which had carried a separate sentencing range, into a single offense having an encompassing sentencing range. The Court dropped a footnote indicating the possibility of constitutional difficulties with such an end-run around the principle it embraced.¹⁷⁹ Further, in holding that the Constitution requires that facts increasing the sentencing range be found by a jury beyond a reasonable doubt, *Apprendi* adopted the suggestion of *Jones v. United States*.¹⁸⁰ In *Jones*, the Court intimated that a fact that *traditionally* has been treated as an element of the offense and subject to proof to a jury beyond a reasonable doubt may not constitutionally be converted into a circumstance to be found by a sentencing judge.¹⁸¹ On this view, the one-offense approach violates the Constitution insofar as it transforms circumstances traditionally relevant to the grade of the homicide offense, such as premeditation or provocation, into factors intended to influence placement of the case within a single, broad sentencing range covering all intentional homicides.

¹⁷⁶ In *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968), the Court held that the Fourteenth Amendment’s Due Process Clause incorporates the Sixth Amendment right to trial by jury, thereby making it applicable in state criminal prosecutions.

¹⁷⁷ *In re Winship*, 397 U.S. 358 (1970).

¹⁷⁸ 120 S. Ct. 2348, 2355 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1990)).

¹⁷⁹ *Id.* at 2363 n.16.

¹⁸⁰ 526 U.S. at 243.

¹⁸¹ *Id.* at 241–42.

Even if the Constitution were to permit it, putting the grading process entirely in the hands of sentencing judges would be bad policy. Democratic political principles argue strongly for involving both juries and legislatures. The criminal law generally is law at its most coercive, and the law of homicide provides for the harshest punishments that the criminal law has to offer. It is an important democratic safeguard to have "we the people" review and endorse the differing levels of coercion contemplated by the various homicide offenses.¹⁸² It is true that legislatures and juries generally do not grade other felonies, such as burglary, into separate offense categories based upon their relative seriousness. However, the degree of governmental coercion available for homicide offenses is potentially much greater and the sentencing spectrum much wider, often ranging from probation to death. Having legislatures specify the considerations relevant to the grade of the offense and having juries apply those considerations on the facts of particular cases provides some guarantee that, in each case, the degree of punishment actually imposed has broad public support and comports with basic community values.¹⁸³ In this way, the participation of legislatures and juries checks governmental power and discretion, much in the same way as the separation of powers generally precludes one governmental branch from acting without the concurrence of another branch. The one-offense approach is at odds with the distrust of governmental power that underlies longstanding and fundamental features of American political institutions.

In contrast with the one-offense approach, the tripartite offense structure that many jurisdictions now use strikes a sensible balance between the need to involve juries and legislatures in the grading process, on the one hand, and the need for efficiency, on the other. Unlike the one-offense approach, three offenses allow both juries and legislatures to have meaningful input regarding the attributes of especially aggravated and mitigated cases of intentional homicide. A fewer number of offenses would disable juries and legislatures from having such input. A greater number of offenses for intentional homicide risks unduly complicating the jury's decision.

2. Aggravating and Mitigating Circumstances

Efficiency also figures into the selection of the aggravating and mitigating circumstances that influence the grade of the offense. The traditional paradigm focuses on too few aggravating and mitigating circumstances and selects the wrong ones for inclusion on a short list. Of course, the longer the list of circumstances relevant to the jury's choice among offenses, the more complex and cumbersome the

¹⁸² See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Colgrove v. Battin*, 413 U.S. 149, 157 (1973); *Williams v. Florida*, 399 U.S. 78, 100 (1970); see also *supra* note 79 and accompanying text.

¹⁸³ Cf. Brenner, *supra* note 3, at 295 (noting that without "the confines of legislatively created categories of punitive severity," judicial sentencing decisions can be arbitrary and disuniform).

jury's task becomes. In addition, making a given circumstance relevant to the grade of the offense lengthens the trial by opening the door to formal presentation of evidence on that issue.

Efficiency and simplicity imply that, in general, only the most important aggravating and mitigating circumstances should influence the grade of the offense.¹⁸⁴ The list should include only those considerations tending to have the strongest bearing on the needs for deterrence, incapacitation, or rehabilitation, or, viewing the criminal process from a retributivist angle, those considerations having the most direct relevance to the offender's degree of moral culpability.¹⁸⁵ Other less important considerations can be taken into account at sentencing, where they can influence placement of the case within the range prescribed for the offense of conviction.

One group of considerations that probably should be left to sentencing involve the defendant's general character, such as prior convictions. It is true that the presence or absence of prior convictions probably has an important bearing on the needs for specific deterrence and incapacitation. Despite their importance to the purposes of criminal punishment, however, the interests in efficiency and simplicity militate strongly against making prior convictions and the like relevant to offense categorization. Making such matters relevant to the offense categorization risks transforming trials into lengthy forays into the accused's entire life history. If prior convictions constitute an aggravating circumstance, then basic fairness dictates that exemplary aspects of the defendant's past life be treated as mitigating circumstances.¹⁸⁶ Making such matters relevant to the offense classification would open the door to formal presentation of evidence through witnesses at the trial on the merits. In contrast, leaving matters pertaining to the defendant's background to sentencing permits the relevant information more informally in written and hearsay form.

Good reasons exist for concluding that the greater efficiency of leaving the defendant's general background to sentencing ought to prevail over that background's relevance to need for punishment. First, the defendant's past acts and character are collateral to the alleged acts that form the basis for criminal liability and around which the trial revolves. Second, making the defendant's general background relevant at the

¹⁸⁴ For a useful discussion of some of the more important considerations bearing on whether a given circumstance should be an element of the offense or a sentencing factor, see Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 325-48 (1998).

¹⁸⁵ *Id.* at 325 (asserting that the greater the moral significance of a given factor or the punishment attached to its existence, the stronger the case for treating it as an element of the offense rather than a sentencing consideration).

¹⁸⁶ In the sentencing phase of death penalty cases, for instance, evidence that defendant had been abused as a child is frequently adduced in mitigation. See Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143 (1999).

trial on the merits invites jurors to convict the accused because he is a bad person.¹⁸⁷ By generally excluding evidence of bad character and past bad acts, the law of evidence tries hard to minimize that danger.¹⁸⁸ The danger obviously does not exist at sentencing because the defendant has already been convicted. For these reasons, it is wise to follow existing law¹⁸⁹ by leaving the defendant's general character to sentencing.

Several principles, then, structure the general framework for reform. First, jurors must be allowed to classify intentional homicides into several offense categories. Substantially different ranges of punishment would remain available for each offense, although perhaps with small areas of overlap. Although less efficient than having a single catch-all offense, this approach is no less efficient than existing law. Furthermore, multiple offenses are necessary to enable juries to play the meaningful role in the grading process that democratic principles demand and the Constitution, to some degree, requires.

Second, in the interests of efficiency and fairness, aggravating and mitigating circumstances relating to the defendant's general background and character are remitted to the sentencing process. In this respect, the approach follows the lead of the traditional paradigm and differs from the new paradigm as it is currently employed, which treats prior convictions as an aggravating circumstance. Some jurisdictions treat prior convictions as relevant not only in the sentencing phase of death penalty cases, but also in the guilt-innocence phase on the question whether the accused has committed capital murder.¹⁹⁰

Third, in the interests of enhanced accuracy, a greater array of aggravating and mitigating circumstances should be permitted to influence the grade of the offense, and the jury should be permitted to consider both types of circumstances in cases where they are jointly present. In these two respects, the framework outlined here

¹⁸⁷ See *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) (finding that making prior convictions an element of the offense rather than a sentencing factor "risks significant prejudice").

¹⁸⁸ Federal Rule of Evidence 404(a) provides that evidence of an accused's character and of other wrongs are generally inadmissible because "[i]t subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." FED. R. EVID. 404, advisory committee's note (quoting CAL. L. REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE, REP., REC. & STUDIES 615 (1964)).

¹⁸⁹ See *Almendarez-Torres*, 523 U.S. at 230 (noting that "the lower courts have almost uniformly interpreted statutes [that authorize higher sentences for recidivists] as setting forth sentencing factors" and itself interpreting the recidivism element as a sentencing factor).

¹⁹⁰ The new paradigm, which derives from the Model Penal Code's death penalty provisions, see *supra* note 9 and accompanying text, was developed primarily for purposes of sentencing. However, some jurisdictions have adopted it as a means of grading offenses and include prior convictions as an aggravating factor.

follows the structure of the new paradigm. This approach to some degree trades efficiency for accuracy. The extent and desirability of the trade-off depends on which aggravating and mitigating circumstances are considered, an issue to which the next section turns.

B. *The Specifics: A Draft Statute*

This section moves from the general framework to the specifics of reform and presents a draft statute. This statute extends the new paradigm's general approach of weighing aggravating and mitigating circumstances to the grading of intentional homicides generally. It directs the jury to classify an intentional homicide as first-degree murder, second-degree murder, or voluntary manslaughter, depending on the balance of aggravating and mitigating circumstances.

Although the draft statute follows the general model of the new paradigm, significant differences exist. In addition to extending the new paradigm's reach beyond the death penalty context, the draft statute offers a list of aggravating and mitigating circumstances that differs from that found in the existing statutes. For example, unlike existing statutes, the draft statute would sometimes allow the existence of a family relationship between the victim or the victim's children to be treated as an aggravating circumstance.

After presenting the text of the draft statute, this section proceeds to explain the statute's relationship to the traditional and new paradigms as well as the basis for including some aggravating and mitigating circumstances and omitting others. The draft statute undoubtedly can be refined and improved. Some scholars and legislators who accept its basic structure will disagree with some of the particulars proposed here. Nonetheless, the statute can provide a useful starting point for discussion and badly needed reform.

The text of the draft statute is as follows:

If the jury finds beyond a reasonable doubt that the defendant intended to kill the victim, it shall decide whether to classify the killing as first-degree murder, second-degree murder, or voluntary manslaughter as described in (A)–(C) below, based upon the aggravating and mitigating circumstances specified in (1) and (2) below.

(A) *First-degree murder*. If the jury finds beyond a reasonable doubt that there is at least one aggravating factor and no mitigating factor present or that the aggravating factor(s) substantially outweigh(s) any mitigating factor(s), it shall return a verdict of first-degree murder.

(B) *Voluntary manslaughter*. If the jury finds beyond a reasonable doubt that there is at least one mitigating factor and no aggravating factor present or that the mitigating factor(s) substantially outweigh(s) any aggravating factor(s), it shall return a verdict of voluntary manslaughter.

(C) *Second-degree murder*. The jury shall return a verdict of second-degree murder if it makes neither the finding specified in (A) nor the finding specified in (B).

(1) *Aggravating Factors*:

- (a) the killing was planned, and the planning exhibited exclusive concern for the accused's selfish financial, sexual, emotional, or other interests and callous disregard for the victim's interests;
- (b) the killer had a family or other intimate relationship with the victim, and the killing was neither motivated by an understandable view of the victim's best interests nor provoked by the victim's serious abuse of the accused or of some other family member;
- (c) the killing occurred while the accused was committing a separate felony involving violence or sexual predation;
- (d) the killing involved torture or the knowing infliction of protracted pain or suffering;
- (e) the killing involved more than one victim;
- (f) the victim was a law enforcement officer or was vulnerable by reason of age or disability.

(2) *Mitigating circumstances*:

- (a) the killer was in an extreme state of passion that was provoked by the victim's commission of a serious legal wrong against the killer or the killer's family;
- (b) the victim consented to the killing to relieve suffering;
- (c) if the defenses of duress or necessity were extended to homicide, the killing would be within one of those defenses;
- (d) the accused genuinely but unreasonably believed that deadly force was needed to prevent the imminent infliction of death or serious bodily harm by an unlawful aggressor.

The following explains the draft statute's relationship to the traditional and new paradigms as well as the reasons why some aggravating and mitigating factors are included while others are omitted:

(1) *Aggravating factors*

The statute's list of aggravating circumstances overlaps to some degree with the traditional paradigm, overlaps to an even greater degree with the new paradigm, but nonetheless differs significantly from both the traditional and new paradigms.

(a) *Premeditation*. Under the traditional paradigm, premeditation is one of two aggravating factors that define first-degree murder, the most serious homicide offense.

In sharp contrast, the death penalty statutes that give rise to the new paradigm generally omit premeditation as an aggravating factor.¹⁹¹

The traditional paradigm's treatment of premeditation is deficient because premeditation is not always aggravating in nature. As the *Dudley & Stephens* lifeboat case¹⁹² and the *Forest* mercy-killing¹⁹³ illustrate, premeditation sometimes involves reflection on a genuine moral dilemma and evinces concern for the victim's interests, not calculated and callous insensitivity.

The Model Penal Code's death penalty provisions and the death penalty statutes respond to this problem by identifying specific situations in which premeditation clearly does reflect a reprehensible and dangerous disregard for others' interests. For example, the Model Penal Code lists a killing committed for pecuniary gain, which will generally involve planning and reflection, as an aggravating factor.¹⁹⁴

This strategy of trying to list specific classes of cases in which premeditation has aggravating significance is underinclusive. For instance, it is hard to see why a killing for pecuniary gain should be treated as worse than one in which the killer plans to kill his spouse for entirely selfish yet non-financial reasons.

The draft statute adopts the more inclusive strategy of phrasing the aggravating factor in terms of the reason why premeditation can have aggravating significance. It proposes that premeditation be treated as an aggravating circumstance when "the planning exhibited exclusive concern for the accused's selfish emotional, sexual, or financial interests and a callous disregard for the victim's interests." Such heightened indifference to and disrespect for the victim's interests exacerbates the wrongfulness of the crime on a retributivist scale. It also strengthens utilitarian arguments for punishment by indicating an increased dangerousness and accompanying need for longer incapacitation. As formulated in the draft statute, the aggravating factor for planning would include contract killings and the like, while at the same time excluding cases of mercy-killing such as *Forest* and other cases involving genuine moral dilemmas about which reasonable persons can and do disagree, such as *Dudley & Stephens*.

(b) *Family relationship*. One of the central theses of this article is that, contrary to current homicide law, the existence of a family relationship between the killer and the victim, or the victim's children, at least sometimes should be treated as an

¹⁹¹ These statutes often do list more specific aggravating factors that usually involve planning. See MODEL PENAL CODE § 210.6(3)(g) (1980) ("The murder was committed for pecuniary gain."). In contrast with other death penalty statutes, the federal provision does list premeditation generally as an aggravating factor. 18 U.S.C. § 3592(c)(9) (1994).

¹⁹² See *supra* notes 104–09, 137–45 and accompanying text.

¹⁹³ See *supra* notes 92–98 and accompanying text.

¹⁹⁴ See MODEL PENAL CODE § 210.6(3)(g) (1980); *State v. Simants*, 250 N.W.2d 881, 891 (Neb. 1977) (stating that aggravating factors include "where the murder was committed for hire, where the murder itself was committed for pecuniary gain, or where the defendant hired another to commit a murder for him").

aggravating factor.¹⁹⁵ Under a retributivist view of punishment, violation of the heightened obligations one owes to family members aggravates the moral wrongfulness of the crime and the punishment that is justly deserved.¹⁹⁶ Utilitarian considerations likewise support treating a family relationship as an aggravating circumstance. Given that persons spend a good portion of their lives around family members, an increased need exists both to incapacitate those who engage in domestic violence and to send a strong message designed to deter such violence.¹⁹⁷ The draft statute accordingly allows for the existence of a family relationship between the killer and the victim, or the victim's children, to be treated as an aggravating factor relevant to the grade of the offense in some circumstances.

The precise formulation and scope of the aggravating circumstance poses some challenges. One issue concerns whether the existence of a family relationship should be treated as an aggravating circumstance in mercy-killing cases such as *Forest*. The best view is that it should not. Such a relationship gives defendants such as Forest a more intimate knowledge of the "victim's" beliefs and values, and thus furnishes a better basis for evaluating whether the family member-victim would regard the killing as in his own interest.¹⁹⁸ Rather than exacerbating the killing's wrongfulness, the existence of a family relationship in these circumstances can have mitigating significance by reinforcing a claim that the defendant genuinely and plausibly believed that the killing was in the victim's best interests.

Another issue concerns whether a familial relationship should be treated as an aggravating circumstance when the accused has killed a family member to protect herself or her children from acts of serious violence committed by that member. In such circumstances, the killer is responding to a serious breach of familial obligations by the victim, and the killing has aspects of self-defense. From a retributivist standpoint, these considerations diminish the inherent wrongfulness of the killing. They also tend to indicate that the killer does not pose a future danger to others¹⁹⁹ and does not stand in need of lengthy incapacitation, thereby substantially weakening utilitarian arguments for the most severe level of punishment. The debate in the caselaw and in the literature accordingly has focused on the degree to which the offense is *mitigated* or even excused by the victim's abuse.²⁰⁰ The draft statute

¹⁹⁵ See *supra* Part III.B.

¹⁹⁶ See *supra* notes 160–61 and accompanying text.

¹⁹⁷ See *supra* notes 162–68 and accompanying text.

¹⁹⁸ See, e.g., DWORKIN, *supra* note 96, at 191; TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 172 (4th ed. 1994).

¹⁹⁹ But cf. *State v. Stafford*, C.C.A. No. 87-95-111, 1988 WL 49907, at *6–7 (Tenn. Crim. App. May 19, 1988) (Byers, J., dissenting) (noting propensity of defendant, who had killed her abusive husband, to marry alcoholics).

²⁰⁰ See *supra* note 128.

phrases the aggravating factor to exclude cases in which the killing was precipitated by a family member's violent abuse of the killer or her children.

(c)–(f) *Commission of a felony, torture, multiple victims, vulnerable victim.* Following the Model Penal Code and state death penalty statutes, the draft statute here identifies commission of a felony, torture, multiple victims, and the victim's vulnerability or status as a law enforcement official as aggravating circumstances.²⁰¹ Each of these circumstances strengthens the utilitarian justifications for punishment by indicating an increased dangerousness and need for incapacitation. On a retributivist view, they exacerbate the wrongfulness of the offense by indicating a heightened insensitivity to the interests of others.

Prior convictions. The Model Penal Code and state death penalty provisions include prior conviction for a violent felony as an aggravating factor.²⁰² This circumstance has undoubted relevance to the appropriate sentence. It bears on the need for incapacitation and, since retributivists take into account the wrongdoer's general character, the amount of punishment that is deserved on retributivist grounds. However, as discussed in the preceding section, it would raise serious concerns about efficiency and fairness to make aggravating and mitigating aspects of the defendant's general background relevant to the grade of the offense at the trial on the merits.²⁰³ The draft statute accordingly omits prior convictions, leaving their influence to sentencing.

(2) *Mitigating Circumstances*

(a) *Heat of passion.* The draft statute in some respects conforms with, and in other important respects differs from, the Model Penal Code and common law formulations of manslaughter.

The draft statute conforms with existing law in requiring both an emotionally overwrought state and some understandable excuse or justification for the loss of control and the killing.²⁰⁴ Existing law is wise to require the concurrence of these two conditions rather than to treat them each as separate mitigating factors. By itself, an emotionally overwrought state can indicate a recurrent lack of self-control, a propensity for violence, and an increased need for incapacitation.²⁰⁵ This is especially

²⁰¹ See MODEL PENAL CODE § 210.6(3)(c), (d), (h), at 109–10 (1980); 18 U.S.C. § 3592(c)(1), (5), (6), (13), (14) (1994); U.S. SENTENCING GUIDELINES MANUAL §§ 3A1.1(b), 5K2.8 (1996) (listing factors which may justify a sentence above the applicable federal sentencing guideline range).

²⁰² MODEL PENAL CODE § 210.6(3)(b), (e) (1980).

²⁰³ See *supra* notes 186–89 and accompanying text.

²⁰⁴ See *supra* Part I.B.

²⁰⁵ Cf. U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (Supp. 1999) (policy statement) (stating that defendant's mental or emotional state ordinarily is not so important as to justify a

so when that state is not an understandable response to a wrongful and unpredictable provocation. In addition, the provocations and reasons existing law identifies as adequate to reduce the grade of the killing are ones that, on reflection, all reasonable persons would regard as insufficient to fully excuse or justify the killing. In the absence of an overwrought state, the actor should recognize the insufficiency of such reasons. Thus, the draft statute here requires both a loss of emotional control and an understandable reason for that loss.

The draft statute departs from the Model Penal Code and the common law in its description of the provocations or excuses that may mitigate a killing. The Model Penal Code's capacious "reasonable excuse" standard has been construed to permit jurors to choose manslaughter, not murder, when the killer's excuse for his loss of control is that a former girlfriend danced with another or the victim sought to leave the household and exercise her legal right to end a marriage.²⁰⁶ Under the common law, the victim's commission of adultery may mitigate the killing to manslaughter. In these respects, the Model Penal Code and the common law allow mitigation in cases where the killer's violent outburst reflects dangerousness and an increased need for incapacitation.²⁰⁷

The draft statute redresses this undue breadth by requiring that the accused's state of passion be provoked by the victim's commission of a serious legal wrong against the accused or his family. This requirement would exclude mitigation in cases where the defendant kills because the victim is exercising her legal right to divorce,²⁰⁸ was dancing with another man,²⁰⁹ or, more controversially, committed adultery.²¹⁰

At the same time it eliminates such undue breadth incorporated in existing law, the draft statute avoids the undue narrowness associated with the common law. The requirement of a serious legal wrong respects the basic principle underlying the common law while avoiding the common law's arbitrary pigeonhole approach, which restricts itself to a few archaic applications of that principle.

(b) & (c) *Consent, duress, & necessity.* Under existing law, consent, necessity, or duress are not generally treated as circumstances that may reduce the grade of the offense from murder to manslaughter.²¹¹ Nonetheless, some jurisdictions recognize

sentence below the applicable guideline range). A diminished capacity for emotional control generally raises the same issues as diminished mental capacity. *See infra* note 215 (citing sources that convey the concern that those who have diminished capacity stand in greater need of incapacitation).

²⁰⁶ *See supra* note 155 and accompanying text.

²⁰⁷ *See supra* notes 121–22, 162–64 and accompanying text.

²⁰⁸ *See supra* notes 155–59 and accompanying text.

²⁰⁹ *State v. Martinez*, 591 A.2d 155 (Conn. App. 1991).

²¹⁰ *See supra* notes 114–28 and accompanying text.

²¹¹ *But cf.* WIS. STAT. ANN. §§ 940.01(2)(d), 939.45(1), 939.46, 939.47 (1996 & Supp. 1999) (reducing first-degree murder to second-degree murder in cases involving duress or necessity).

consent, duress, or necessity as *complete defenses* to homicide liability.²¹² The arguments that these circumstances justify or excuse a homicide are certainly respectable, as evidenced by the acceptance they have won. Even if insufficient to support absolving actors of criminal liability altogether, the arguments at least demonstrate that consent, duress, or necessity attenuate the retributive and utilitarian justifications for criminal punishment. The draft statute accordingly identifies consent, duress, and necessity as mitigating circumstances relevant to the grade of the offense.

These circumstances should be treated as mitigating even when not coupled with heat-of-passion. Existing law recognizes certain provocations or excuses as adequate to reduce murder to manslaughter only when coupled with extreme emotional or mental disturbance. However, these provocations are ones that, on reflection, no reasonable person would regard as excusing or justifying the killing. In contrast, consent, duress, and necessity are circumstances that a reflective and reasonable person might regard as excusing or justifying the killing. Cases involving consent, duress, or necessity therefore can and often do involve premeditation, which is mitigating in nature because it indicates both desirable moral reflection and ambivalence. In those jurisdictions not recognizing a complete defense, consent, duress, and necessity should be treated as mitigating circumstances without a further requirement that the accused was emotionally overwrought.

(d) *Imperfect self-defense*. Under the law of many jurisdictions, an intentional killing is reduced from murder to manslaughter where the accused genuinely, but unreasonably, believed that deadly force was needed to repel an imminent unlawful threat of serious violence.²¹³ The draft statute accepts the strong and obvious justification for treating such “imperfect self-defense.”

Mental disability or disturbance. The Model Penal Code and many death penalty statutes list extreme mental or emotional disturbance and/or diminished mental capacity short of insanity as mitigating factors.²¹⁴ Such circumstances may reduce the wrongfulness of the crime on a retributive scale by diminishing the actor’s responsibility and moral culpability for his acts. But these circumstances also tend to strengthen utilitarian justifications for punishment by indicating a dangerous lack of

²¹² A minority of jurisdictions and the Model Penal Code recognize duress as a complete defense to homicide liability. See LAFAVE & SCOTT, *supra* note 1, § 5.3(b), at 434–37; MODEL PENAL CODE 1, §§ 2.09, 3.02 (1980). For authority accepting necessity as a defense to homicide liability, see *supra* note 139.

As for consent, all jurisdictions treat voluntary passive euthanasia as legitimate in some circumstances and Oregon has legalized physician-assisted suicide.

²¹³ LAFAVE & SCOTT, *supra* note 1, § 7.11(a), at 665–66.

²¹⁴ MODEL PENAL CODE § 210.6(4)(b), (g) (1980); see also 18 U.S.C. § 3592(a)(1), (6) (1994).

self-control and an increased need for incapacitation.²¹⁵ In addition, making the defendant's mental state and history relevant to the grade of the offense in a trial on the merits raises efficiency concerns. The draft statute here accordingly declines to treat mental disturbance or incapacity as mitigating circumstances relevant to the grade of the offense and instead leaves the import of these matters to sentencing.

Absence of prior record. As explained above, the draft statute does not treat the defendant's prior record, character, and background as relevant to the grade of the offense and instead leaves these matters to sentencing.²¹⁶

C. Practical Implications

This section tests the practical implications of the draft statute by applying it to some of the cases discussed previously.

1. Anderson

The *Anderson* case,²¹⁷ which the California Supreme Court held to be a clear case of second-degree murder under the traditional paradigm, becomes a very clear case of first-degree murder under the draft statute. Anderson undressed, chased, and brutally butchered a ten-year-old child in whose household he was living. Numerous aggravating circumstances accompanied the killing. First, the circumstance specified in (1)(c) is present because the killing occurred while Anderson was attempting to and did sexually abuse the child. Second, because Anderson inflicted numerous slash wounds while chasing the bleeding young girl around the house, the killing involved torture or the knowing infliction of protracted pain under (1)(d). Third, the victim's age would also be treated as an aggravating factor under (1)(e). Finally, the de facto parental role Anderson evidently played with respect to the victim would trigger the "family relationship" aggravating circumstance set forth in (1)(b), depending on the

²¹⁵ See MODEL PENAL CODE § 210.3 cmt. 5, at 71–72 (1980); A. GOLDSTEIN, *THE INSANITY DEFENSE* 206–07 (1967); Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 850–53 (1977). The federal sentencing guidelines reflect the concern that, in someone who has engaged in violence, diminished capacity might increase the need for incapacitation. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2)–(3) (2000) (listing diminished capacity as possibly warranting a sentence below the guideline range except when "the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence" or when "the defendant's criminal history indicates a need to incarcerate the defendant to protect the public").

²¹⁶ See *supra* notes 186–89 and accompanying text.

²¹⁷ *People v. Anderson*, 447 P.2d 942 (Cal. 1968) (en banc); see *supra* notes 62–74 and accompanying text.

definition of that term.²¹⁸ In light of these numerous aggravating factors and the absence of any mitigating factor, first-degree murder is the only appropriate classification of the offense.

2. Dudley & Stephens

Instead of classifying Dudley and Stephens's premeditated lifeboat killing²¹⁹ as first-degree murder, as the traditional paradigm would, the draft statute would put the killing in the least serious offense category.

The jury in *Dudley & Stephens* found that both Dudley and Stephens reasonably believed killing the victim was necessary to save the lives of three others. In a jurisdiction that extended the necessity defense to homicide cases,²²⁰ this finding would absolve Dudley and Stephens of any criminal liability. In a jurisdiction that declined to recognize necessity as a complete defense, the mitigating circumstance set forth in (2)(c) would apply.

The only aggravating circumstance that conceivably may apply to the facts of *Dudley & Stephens* is (1)(a), which covers planned killings where the planning exhibits "exclusive concern for the accused's selfish financial, sexual, emotional, or other interests and callous disregard for the victim's interests." Dudley and Stephens did plan the killing. However, they were not callously insensitive to the victim's interests. They delayed the killing while a reasonable hope of rescue remained, and killed only when the victim was close to death and they were themselves on the verge of starvation. The best view, then, is that (1)(a) does not apply.

Because the killing involves a mitigating circumstance and no aggravating circumstances, the draft statute would treat it as voluntary manslaughter.

3. Forest

Forest, who killed his debilitated and dying father, was convicted of first-degree premeditated murder under the traditional paradigm. Under the draft statute, it is quite unlikely that the killing could or would be placed in the most serious offense category.

²¹⁸ The definition of a "family" is hardly a settled matter. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994); Will Kymlicka, *Rethinking the Family*, 20 PHIL. & PUB. AFFAIRS 77 (1991); Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925. No doubt the proper definition depends on the context and the purposes of the definition in that context. Here, the retributive and utilitarian justifications for increased punishment would seem to turn on whether Anderson had assumed parental duties of care with respect to the child.

²¹⁹ *The Queen v. Dudley & Stevens*, 14 Q.B.D. 273 (1884); see *supra* notes 104–09, 137–45 and accompanying text.

²²⁰ See *supra* note 128 and accompanying text.

No aggravating circumstances seem to apply. The killing was planned but, as in *Dudley & Stephens*, the planning exhibited concern for the victim's interest rather than callous indifference. Thus, the aggravating circumstance for premeditation specified in (1)(a) would not apply.

The fact that Forest genuinely believed that the homicide was in his father's interests would not alone justify overlooking his family relationship to the victim as an aggravating circumstance. His view must have some justification; it must be one that jurors can understand and sympathize with. Given that Forest's father had no prospect of recovery, was facing imminent death, and evidently was experiencing physical and/or psychic pain, a jury might well find Forest's view of his father's best interests to be understandable. If so, the family relationship aggravating factor set forth in (1)(c) would not apply. The absence of any aggravating factor would preclude a first-degree murder verdict.

The mitigating circumstance described in (2)(b) would exist if the facts show that Forest's father consented to the killing to relieve suffering. The report of the case does not describe the facts pertinent to this issue, which the traditional paradigm wrongly treats as irrelevant to the grade of the offense. The son's belief that the killing was in his father's best interests, while sufficient to avoid the aggravating factor specified in (1)(c), would not be sufficient to trigger the mitigating circumstance described in (2)(b), which requires consent. If the father had the capacity to give consent at the time of the killing, his actual consent would be required. In the event he lacked such capacity, then the focus would shift, as it does in cases of passive euthanasia for incompetent patients, to whether consent fairly could be implied from the father's prior statements, beliefs, and values.

Under the draft statute, therefore, the killing would probably be classified as either voluntary manslaughter or second-degree murder. In a troubling case such as *Forest*, the debatable nature of the proper offense classification is a virtue rather than a vice. The traditional paradigm focuses solely on whether the killing was premeditated. This focus is perverse in cases such as *Forest*, which involve genuine moral dilemmas and where reflection therefore indicates the understandable existence of moral ambivalence. In contrast, the draft statute focuses the jury's attention on precisely the vexing issues that bear most strongly on a moral valuation of the act and on the need for criminal punishment.

D. *Objections*

This section briefly responds to two objections likely to be pressed against the draft statute proposed here: That it gives juries undue discretion, and that it undermines the role played by existing death penalty statutes.

1. Discretion

The principal criticism of the new paradigm, which has been directed at its role in implementing the death penalty, has been that it gives sentencing judges and juries too much discretion.²²¹ This objection to some degree rests on opposition to the death penalty rather than a dispassionate assessment of the new paradigm's merits as a general grading mechanism. The strong public support for the death penalty means that those who oppose it on moral or religious grounds have a decidedly uphill battle in the political process. To succeed in the courts opponents must rely upon *Furman*'s theme of undue sentencing discretion.²²² Strongly felt opposition to the death penalty, together with *Furman*, invite exaggeration of discretion associated with the new paradigm.

In the death penalty context, the broad-based objection that the new paradigm creates a constitutionally unacceptable degree of discretion has been rejected.²²³ Such a constitutional objection would fare even more poorly if lodged against the new paradigm as a general grading framework, apart from its role in implementing the death penalty.

Still, as a matter of policy, the undue discretion objection raises serious issues and deserves a considered response. One complaint is that the new paradigm relies upon aggravating circumstances that are ambiguous and nearly all-encompassing.²²⁴ Another complaint is that the process of weighing aggravating and mitigating circumstances is without method.²²⁵ These criticisms are right in identifying the bases of the discretion that the new paradigm gives to juries. But they fall considerably short as reasons to reject the new paradigm in favor of the traditional grading paradigm.

A starting point is that, at least in many jurisdictions, the traditional paradigm gives juries unduly broad and unguided discretion to draw lines among offenses. Courts in many jurisdictions have reduced the term "premeditation" to "a mystifying cloud of words."²²⁶ Some juries undoubtedly use this "unstructured discretion"²²⁷ to

²²¹ See, e.g., citations, *supra* note 13.

²²² See generally *supra* Part I.A.

²²³ See, e.g., *Jones v. United States*, 527 U.S. 373, 400–02 (1999) (plurality opinion); *Tuilaepa v. California*, 512 U.S. 967, 974 (1994); *Zant v. Stephens*, 462 U.S. 862, 875–77 (1983); *Steiker & Steiker*, *supra* note 13, at 378–89. For one case in which an undue discretion objection succeeded, see *Godfrey v. Georgia*, 446 U.S. 420 (1980).

²²⁴ See, e.g., Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2608–10 (1996); Givelber, *supra* note 13, at 412; David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts about Money, Myth, and Morality*, 37 U. KAN. L. REV. 443, 450 (1989).

²²⁵ See *Steiker*, *supra* note 224, at 2608–10; *Zimring & Hawkins*, *supra* note 13, at 127–28.

²²⁶ Cardozo, *supra* note 84, at 100.

²²⁷ *People v. Morrin*, 187 N.W.2d 434, 447 (Mich. App. 1971).

take implicit account of other aggravating circumstances, which is the courts' unstated rationale for diluting "premeditation's" ordinary meaning in the first place. In many jurisdictions the traditional paradigm also gives jurors undue discretion to draw the line between murder and manslaughter. Eleven jurisdictions use the Model Penal Code's provision, which reduces murder to manslaughter if the killer acted under an extreme emotional or mental disturbance for which there is a reasonable excuse or explanation.²²⁸ By design, this provision provides exceedingly little guidance as to what constitutes a "reasonable excuse or explanation" and leaves jurors essentially on their own. Jurors have somewhat comparable discretion in those jurisdictions that have abandoned the common law pigeonholes of adequate provocation in favor of instructing juries that any provocation may suffice so long as it would cause a reasonable person to lose emotional control.²²⁹

Such discretion produces undesirable consequences. First, it leads to inconsistent results. When a court gives jurors open-ended instructions on the meaning of premeditation, some juries can be expected to fall back on premeditation's ordinary meaning, which is well understood.²³⁰ Other juries will no doubt use the fuzzy instructions on "premeditation" as a guise to take at least implicit account of other aggravating and mitigating circumstances. In doing so, they are on their own as to which circumstances count, and views can be expected to differ among jurors and juries. Different juries also presumably have disparate notions of what constitutes a reasonable excuse or adequate provocation sufficient to mitigate murder to manslaughter. Second, such unguided discretion can produce indefensible results, as when murder is reduced to manslaughter where the provocation was that the victim exercised her legal right to end an intimate relationship²³¹ or made an unwanted homosexual advance.²³²

²²⁸ See *supra* note 49.

²²⁹ See *supra* notes 54–55 and accompanying text.

²³⁰ See *supra* notes 63, 86 and accompanying text.

²³¹ See *supra* notes 155–59 and accompanying text.

²³² See *Schick v. State*, 570 N.E.2d 918, 921–22 (Ind. Ct. App. 1991) (reducing murder to manslaughter based on such a provocation); *State v. Skaggs*, 586 P.2d 1279, 1284 (Ariz. 1978) (en banc) (allowing instruction on provocation); *Walden v. State*, 307 S.E.2d 474, 475 (Ga. 1983) (noting jury instruction on voluntary manslaughter); *People v. Saldivar*, 497 N.E.2d 1138, 1139 (Ill. 1986) (indicating defendant found guilty of voluntary manslaughter where parties stipulated that victim made a homosexual advance); *People v. Lenser*, 430 N.E.2d 495, 498 (Ill. App. Ct. 1982) (allowing instruction on voluntary manslaughter). *But see* *Commonwealth v. Medeiros*, 479 N.E.2d 1371, 1375–76 (Mass. 1985) (assuming that if victim's homosexual advances constituted reasonable provocation, defendant was not entitled to an involuntary manslaughter instruction). For a discussion of these cases and the issues they raise, see Dressler, *supra* note 124; Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133 (1992).

The new paradigm substantially minimizes the undue discretion associated with the traditional paradigm. Instead of allowing juries discretion implicitly to consider aggravating circumstances other than premeditation, it explicitly identifies the circumstances that permissibly may be taken into account. As compared with the Model Penal Code's manslaughter provisions and other expanded versions of the common law approach, the new paradigm also gives juries substantially more guidance as to which excuses suffice to mitigate murder to manslaughter. By refusing to allow a loss of emotional control to mitigate murder to manslaughter unless the loss was provoked by the victim's commission of "a serious legal wrong," the draft statute would help avoid the indefensible results associated with the undue breadth of the traditional paradigm.

Although the new paradigm in these respects limits discretion as compared with the traditional paradigm, it does introduce new sources of discretion. For instance, the draft statute does not make the planned nature of a killing an aggravating circumstance by itself. Planning becomes an aggravating circumstance only when it "exhibited exclusive concern for the accused's selfish financial, sexual, emotional, or other interests and callous disregard for the victim's interests." In addition, the statute lists as mitigating circumstances the victim's "consent" to the killing and a loss of emotional control provoked by the commission of a "serious legal wrong" on the part of the victim. The interpretation and application of these phrases call for the exercise of significant judgment and discretion.

There are two principal justifications for this discretion. The first is that some significant discretion is an inevitable part of any system that gives juries a meaningful role in the grading process. For the criminal jury to play its accepted and appropriate role of assuring that the exercise of governmental coercion comports with basic community values,²³³ legal standards must leave room for discretion.

The second justification is that, by channeling the discretion that allows accordance with more appropriate considerations, the draft statute can be expected to improve substantially upon the accuracy of classification decisions. Traditional law sometimes gives jurors unfettered discretion, thereby opening the door to inconsistent results and the influence of arbitrary considerations. Where the traditional paradigm does channel discretion, it often does so along the wrong lines. Some jurisdictions and some juries do hew to "premeditation's" ordinary meaning of planning. But premeditation, so defined, sometimes has mitigating significance, as in the *Forest* mercy-killing²³⁴ and the *Dudley & Stephens* lifeboat cases.²³⁵ Also, other aggravating circumstances can outweigh whatever mitigating significance attaches to the absence of premeditation. The sadistic but impulsive child-killing in *Anderson* illustrates this

²³³ See *supra* note 79 and accompanying text.

²³⁴ See *supra* notes 92–98 and accompanying text.

²³⁵ See *supra* notes 104–09, 137–45 and accompanying text.

kind of case, which arises with some frequency.²³⁶ As for the line between murder and manslaughter, the common law pigeonholes of adequate provocation do limit discretion. However, these pigeonholes are both overinclusive because they treat provocations such as adultery and dueling as adequate and underinclusive because they treat mitigating circumstances such as necessity and victim consent as irrelevant. As compared with the aggravating and mitigating circumstances on which the traditional approach relies, each of the aggravating and mitigating circumstances set forth in the draft statute bear more strongly on the utilitarian and retributive purposes of punishment and better comport with commonly held moral judgments. Consequently, the draft statute promises to do a much better job of classifying homicides according to their relative seriousness.

Similar considerations justify the discretion that the new paradigm introduces through its requirement that aggravating and mitigating circumstances be weighed where they coexist. In the death penalty context, critics object that this weighing is left to the unfettered discretion of jurors.²³⁷

At the outset, this objection becomes much less forceful insofar as the new paradigm is used to grade the offense rather than decide the appropriate sentence. Arguable aggravating and mitigating circumstances are almost always present in the sentencing phase of death penalty cases because the list of aggravating and mitigating circumstances includes circumstances relating to the defendant's background.²³⁸ Indeed, the Supreme Court has held that the defense may rely on any relevant mitigating circumstances, not just those specified by statute.²³⁹ In contrast, as outlined in the draft statute proposed here, the new paradigm as a grading device excludes circumstances relating to the defendant's background and character. The necessity for weighing, routine in death penalty cases, is relatively rare in the grading context. For example, none of the test cases discussed in this Part involves the simultaneous presence of aggravating and mitigating circumstances.

Although juries are given significant discretion when they are required to weigh in the relatively rare cases involving both aggravating and mitigating circumstances, the alternative of avoiding such weighing would be worse. It is certainly true that there is no scientific table of weights a jury can use to compare the significance of, for example, a breach of familial obligations with a state of passion brought on by the victim's commission of a serious wrong.²⁴⁰ Weighing the relative importance of such

²³⁶ See *supra* note 62 and accompanying text.

²³⁷ See *supra* note 225.

²³⁸ Persons who are convicted of death-eligible offenses routinely point to a history of childhood abuse as a mitigating circumstance. Crocker, *supra* note 186, at 1143.

²³⁹ See *supra* note 41.

²⁴⁰ See ZIMRING & HAWKINS, *supra* note 33, at 81-91(1986); Gottlieb, *supra* note 224, at 450. In his famous 1937 article, which influenced the drafters of the Model Penal Code's death penalty provisions, Herbert Wechsler acknowledged that "it is impossible in the present state of

circumstances involves the exercise of moral judgment and introduces discretion. To forego weighing altogether, however, would hobble the jury's function of buffering governmental coercion with the community's moral sense.²⁴¹ It would also produce unacceptable results. Traditional law, for instance, treats the victim's commission of adultery as a mitigating circumstance, but arbitrarily takes no account of a simultaneous presence of the killer's breach of family obligations and other aggravating circumstances such as the killer's sadism. The aggravating and mitigating circumstances specified in the draft statute are strongly tied to the retributive and utilitarian justifications for criminal punishment. Ignoring one or another set of circumstances produces unacceptable results.

Several lines of reasoning, then, converge to answer the undue discretion objection. First, the new paradigm substantially minimizes the undue discretion created by the traditional paradigm, at least as it exists in many jurisdictions. It is by no means clear that the new paradigm, on balance, increases discretion as compared with the traditional paradigm. Second, the new paradigm limits discretion based upon a better set of considerations and improves the accuracy of classification decisions. Insofar as it channels discretion, the traditional paradigm does so based upon considerations having an inconsistent relationship with the purposes of criminal punishment and commonly held moral judgments. Third, in giving juries discretion, the new paradigm permits juries to play a meaningful role in the grading process, thereby honoring the jury's role in legitimizing governmental coercion. Even if one indulges the debatable assumptions that the new paradigm increases discretion and that such discretion is undesirable, whatever disadvantages flow therefrom are outweighed by the benefit of enhanced accuracy.

2. *The Death Penalty*

Another potential objection to the draft statute is that it would stack the deck in favor of the death penalty. The draft statute permits a verdict of first-degree murder only when either at least one aggravating circumstance and no mitigating circumstances are present or the aggravating circumstance(s) substantially outweighs any mitigating circumstance(s). Given that death penalty statutes use the same aggravating-mitigating circumstances framework, a verdict of first-degree murder might seem to imply that death is the appropriate punishment under existing death penalty statutes. In essence, this objection maintains that the new paradigm cannot be used both as a general grading framework and as a means of implementing the death penalty.

knowledge to determine with any precision what weight should be given the various aggravating and extenuating circumstances, either absolutely or relatively." Wechsler & Michael, *supra* note 61, at 1301.

²⁴¹ See *supra* note 79 and accompanying text.

This objection correctly recognizes that the same aggravating circumstances relevant to the grade of the offense would also be considered in the penalty phase of a death penalty case. This would mean that a defendant who has been convicted of first-degree murder would enter the penalty phase with the jury already having found the existence of an aggravating circumstance that could justify imposition of the death penalty. However, this should not give rise to an objection that the penalty phase is unfairly skewed in favor of the death penalty.

First, as a constitutional matter, the Supreme Court has held that an aggravating circumstance may be used *both* to define the offense of capital murder in the guilt-innocence phase and to support a decision in favor of death in the penalty phase. In *Lowenfield v. Phelps*,²⁴² the Court upheld a Louisiana death sentence where the sole aggravating circumstance found by the jury in the sentencing phase was identical to an element of the capital murder statute. The Constitution, the Court declared, requires that the State “‘genuinely narrow the class of persons eligible for the death penalty.’”²⁴³ According to the *Lowenfield* Court, this narrowing may be accomplished *either* by “narrow[ing] the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or . . . [by] findings of aggravating circumstances at the penalty phase.”²⁴⁴

Second, as a matter of policy, the considerations that are relevant to the grade of the offense are also relevant to the appropriate punishment. The circumstances that the draft statute identifies as relevant to the grade of the offense were chosen because they bear most strongly on the retributive and utilitarian justifications for punishment. These considerations are obviously relevant in deciding not only the appropriate sentencing range but also where a given case should be placed within a sentencing range. It would be highly anomalous to take the position that the considerations most directly linked to the overriding purposes of criminal punishment are irrelevant either to the grade of the offense or, in death penalty jurisdictions, to the appropriateness of death.

Third, any unwarranted skewing in favor of death can be avoided by instructing the jury to apply a higher standard in the penalty phase. The same considerations relevant in deciding whether a killing belongs in the most serious offense category also bear on the appropriateness of the death penalty. But a conclusion that a killing belongs in the most serious offense category does not imply that the death penalty is warranted. The death penalty is appropriately reserved for the worst cases of first-degree murder. Therefore, the findings necessary to support first-degree murder—either that one aggravating circumstance and no mitigating circumstances are present or that any aggravating circumstance(s) substantially outweigh(s) any mitigating circumstance(s)—should not automatically trigger the death penalty. In considering

²⁴² 484 U.S. 231 (1988).

²⁴³ *Id.* at 244 (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

²⁴⁴ *Id.* at 246.

aggravating and mitigating circumstances, the sentencer instead must employ a more demanding standard. The death penalty requires a preponderance of aggravating over mitigating circumstances greater than that needed to support a verdict of first-degree murder. Juries accordingly should be instructed that, to justify a sentence of death, they must conclude something along the lines that any aggravating circumstance(s) outweigh(s) any mitigating circumstance(s) so strongly that death is the appropriate punishment. Although this requires jurors to draw distinctions of degree, the law of homicide elsewhere asks jurors to draw such lines.²⁴⁵

Fourth, a verdict of first-degree murder under the draft statute does not imply the appropriateness of the death penalty for the additional reason the sentencing phase considers circumstances not relevant to the grade of the offense. Principal among these would be circumstances relating to the defendant's background and character, which the draft statute excludes from the grading phase in the interests of efficiency and fairness.²⁴⁶ Any prior convictions for a dangerous felony, now routinely listed in death penalty statutes as an aggravating circumstance, would be considered in the penalty but not the grading phase. The defendant's history of physical and/or sexual abuse as child, which is regularly introduced as a mitigating circumstance in death penalty cases, would also be considered.

The proposal here, then, does not unduly predispose the sentencing phase in favor of death or in other ways that would render existing death penalty statutes unworkable. Many of the same circumstances would be relevant to both grading and sentencing. Given that both inquiries share the common purpose of classifying homicides and offenders according to their culpability, this is as it should be. Due to the higher standard applicable and the additional circumstances considered in the sentencing phase, that phase will remain distinctive and its outcome far from a foregone conclusion. The new paradigm can be used both for grading and for implementing the death penalty.

V. CONCLUSION

A profound transformation is already underfoot in the way that the law classifies intentional homicides. A new paradigm has emerged. Although originating as a means of implementing death penalty, it has clear implications for the general grading of intentional homicides and its use has been gradually expanding beyond the death penalty context. This fundamental change now brewing in the law deserves notice and critical evaluation.

²⁴⁵ With respect to unintentional killings, for instance, depraved heart murder and reckless manslaughter involve the same criteria and the distinction between them is one of degree. See MODEL PENAL CODE § 210.2 cmt. 4, at 21-22; *see, e.g.*, KAN. STAT. ANN. § 21-3402(b) (1995) (defining depraved heart murder as reckless killing "in circumstances manifesting *extreme* indifference to the value of human life" (emphasis added)).

²⁴⁶ *See supra* notes 186-89 and accompanying text.

This article's critical thesis is that this incipient change should be embraced and expedited. The traditional paradigm frequently produces disturbing results. First-degree murder anomalously encompasses mercy and necessity killings such as in *Forest* and *Dudley & Stephens* but not the savage killing of a child to whom the killer owed a duty of care such as in *Anderson*. Also, while a killer's excitement over the "infidelity" of a spouse who moved out and announced her intention to divorce may be used to reduce murder to manslaughter, the fact that the killer brutally shot his spouse in full view of their child and deprived his child of her custodial parent is irrelevant to the grade of the offense.

The new paradigm helps avoid such grotesque distortions of the purposes of criminal punishment and basic moral sensibilities. It does so by changing the classification criteria, expanding the aggravating and mitigating circumstances relevant to the grade of the offense, and permitting aggravating and mitigating circumstances to be weighed against one another where they both exist. Of course, the content inserted into this framework merits debate and modification. Contrary to existing versions of the new paradigm, for instance, the argument here maintains that the killer's breach of familial obligations should weigh in as an aggravating factor in many cases.

Criminal statutes are often ambiguous and/or incorporate the common law power of judges to change the law. Through the exercise of their powers of interpretation as well as through their often considerable sentencing discretion, judges may be able to give effect to notions such as the aggravating nature of the killer's breach of familial obligations and the mitigating nature of consent, duress, or necessity. Judges, of course, cannot alter the basic classification criteria written into existing statutes. Scholars and others in the legal community need to encourage legislatures to hasten their partial movements toward a better approach.